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EDITOR'S NOTE

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ay 15, 1985

Title: Attorney General of New York, Appellant
v.
Eduardo Soto-Lopez, et al.

Court: United States Court of Appeals
for the Second Circuit

Counsel for appellant: Hermann,Robert

Counsel for appellee: Cartagena,Juan, Koerner,Leonard, Kimerling,Kenneth

ntry	Date	Note	Proceedings and Orders
1	May 15 1985	G	Statement as to jurisdiction filed.
2	Jun 6 1985		Motion of appellees Eduardo Soto-Lopez, et al. to dismiss or affirm filed.
3	Jun 11 1985		DISTRIBUTED. June 27, 1985
4	Jun 20 1985		Waiver of right of appellee City of New York to respond filed.
5	Jul 1 1985		PROBABLE JURISDICTION NOTED.
6	Jul 12 1985	D	Motion of appellant to disperse with printing the joint appendix filed.
8	Jul 25 1985		Order extending time to file brief of appellant on the merits until September 6, 1985.
9	Sep 10 1985		Brief of appellant Atty. Gen. of NY filed.
11	Sep 17 1985		Record filed.
12	Sep 18 1985		Motion of appellant to dispense with printing the joint appendix DeNIED.
14	Sep 20 1985		Order extending time to file brief of appellee on the merits until November 1, 1985.
15	Oct 26 1985		Joint appendix filed.
16	Nov 1 1985		Brief amicus curiae of Vietnam Veterans of Americans filed.
17	Nov 1 1985		Brief of appellees Eduardo Soto-Lopez, et al. filed.
18	Nov 21 1985		SET FOR ARGUMENT, Wednesday, January 15, 1986. (4th case).
19	Jan 15 1986		ARGUED.

JURISDICTIONAL

STATEMENT

84-1808 (1)

No. . .

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MAY 15 1985
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel, and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellants,

vs.

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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Questions Presented

1. Do article V, § 6 of the New York State Constitution and § 85 (l)(a) of the New York State Civil Service Law, which provide that all persons who enter the armed forces while New York State residents become eligible to receive additional points on their score if they subsequently pass competitive civil service examinations, and which this Court held constitutional in *August v. Bronstein*, 417 U.S. 901 (1974), deny veterans the equal protection of the law and violate their right to travel?

2. Did this Court overrule *August v. Bronstein* when it decided *Zobel v. Williams*, 457 U.S. 55 (1982)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
1. Facts Material To Consideration Of the Questions Presented	5
2. The Course of Proceedings And Disposition In The Courts Below	5
REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTIONS PRESENTED BY THIS APPEAL	7
I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE DECISION IS IN DIRECT CONFLICT WITH *AUGUST V. BRONSTEIN*, 417 U.S. 901 (1974), IN WHICH THIS COURT HELD THAT THE CHALLENGED PROVISIONS WERE CONSTITUTIONAL	7
A. The Decision Of The Court Below Is In Direct Conflict With *August v. Bronstein*	7
B. *Zobel v. Williams*, 457 U.S. 55 (1982), Did Not Overrule *August v. Bronstein*	9
II. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUES ARE OF GREAT IMPORTANCE TO HUNDREDS OF THOUSANDS OF STATE CIVIL SERVICE EMPLOYEES IN MANY STATES	16
CONCLUSION	18

APPENDIX

		Page
A	Opinions, orders, findings of fact and conclusions of law delivered upon the rendering of the judgment by the court below:	
	Opinion of the United States Court of Appeals for the Second Circuit in *Soto-Lopez v. New York City Civil Service Commission*, No. 85-7325 (2d Cir. Feb. 15, 1985)	A-1
B	Other opinions, orders, findings of fact and conclusions of law rendered by courts in the case:	
	Endorsed Memorandum of the United States District Court for the Southern District of New York in *Soto-Lopez v. New York City Civil Service Commission*, No. 83 Civ. 1370 (RO) (S.D.N.Y. Mar. 8, 1985)	A-37
C	Judgment appealed from:	
	Final Judgment of United States District Court for the Southern District of New York in *Soto-Lopez v. New York City Civil Service Commission*, No. 83 Civ. 1370 (RO) (S.D.N.Y. Mar. 14, 1984)	A-38
D	Notice of appeal:	
	Notice of Appeal from the United States Court of Appeals for the Second Circuit to the Supreme Court of the United States by the Attorney General of the State of New York, filed May 10, 1985	A-39

TABLE OF AUTHORITIES

Cases:	Page
Andrade v. Nadel, 477 F.Supp. 1275 (S.D.N.Y. 1979)	8
August v. Bronstein, 369 F.Supp. 190 (S.D.N.Y. 1974)	*passim*
August v. Bronstein, 417 U.S. 901 (1974)	*passim*
Baggett v. Bullit, 377 U.S. 360 (1964)	8
Dombrowski v. Pfister, 380 U.S. 479 (1965)	8, 16-17
Hicks v. Miranda, 422 U.S. 332 (1975)	9, 15
Mandel v. Bradley, 432 U.S. 173 (1977)	9
Ohio ex rel. Easton v. Price, 360 U.S. 246 (1959)	9
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1975)	9
Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F.2d 259 (2d Cir. 1967)	9
Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972)	8, 13, 15
Shapiro v. Thompson, 394 U.S. 618 (1969)	11
Soto-Lopez v. New York City Civil Service Commission, 755 F.2d 266 (2d Cir. 1985)	*passim*
Spatt v. New York, 414 U.S. 1058 (1973)	8, 16
Sturgis v. Washington, 414 U.S. 1057 (1973)	8, 16
Tully v. Griffin, Inc., 429 U.S. 68 (1976)	9, 15
United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of Camden, 104 S.Ct. 1020 (1984)	11
Vlandis v. Kline, 412 U.S. 441 (1973)	11

Cases:	Page
Zobel v. Williams, 619 P.2d 448 (Alaska 1980) ...	10
Zobel v. Williams, 457 U.S. 55 (1982)	*passim*
Constitutional Provisions:	
U.S. Const. art. I, § 8	3
U.S. Const. art. IV, § 2	3
U.S. Const. amend. XIV, § 1	2, 3
N.Y. Const. art. V, § 6 (McKinney 1969)	*passim*
N.Y. Const. art. V, § 6 (1929) (amended 1945) ..	12
N.Y. Const. art. V, § 6 (1945) (amended 1949) ..	12
Statutes:	
28 U.S.C. § 1254(2) (1982)	2
28 U.S.C. § 1343(3) (1982)	2
28 U.S.C. § 1343(4) (1982)	2
28 U.S.C. § 2201 (1982)	2
28 U.S.C. § 2202 (1982)	2
42 U.S.C. § 1983 (1982)	2, 5
42 U.S.C. § 1988 (1982)	2
Ala. Code § 31-6-11 (1983)	16
Alaska Stat. § 26.15.130 (1978)	16

Cases:	Page
Alaska Stat. § 26.15.140 (1978)	16
Alaska Stat. § 26.15.150 (1978)	16
Conn. Gen. Stat. Ann. § 27-103(b) (West 1958) ..	16
Del. Code Ann. tit. 29, § 5935 (Michie 1975)	16
Fla. Stat. Ann. § 295.01 (West Supp. 1985)	16
Ind. Code Ann. § 10-5-16.5-1(Burns 1981).....	16
Ind. Code Ann. § 10-24-1 (Burns Supp. 1984) ...	16
Ky. Rev. Stat. Ann. § 40.010 (Michie 1980 & Supp. 1984)	16
La. Rev. Stat. Ann. § 29.293 (West 1975)	16
Me. Rev. Stat. Ann. tit. 37-B §504 (West Supp. 1984)	16
Me. Rev. Stat. Ann. tit. 37-B §505 (West Supp. 1984)	16
Mich. Comp. Laws Ann. §35.1001 (West Supp. 1984)	16
Mich. Comp. Laws Ann. §35.1022 (West Supp. 1984)	16
Miss. Code Ann. § 35-7-5 (Law. Co-op. 1972) ...	16
N.Y. Civ. Serv. Law § 85(1)(a) (McKinney 1983).	*passim*
Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 499	8
Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 501	8

Cases:	Page
Or. Rev. Stat. § 408.010 (1983)	16
R.I. Gen. Laws § 36-3-3(10) (Michie 1984)	16
R.I. Gen. Laws § 36-4-19 (Michie 1984)	16
S.D. Codified Laws Ann. § 33-16-1 (Allen Smith 1976)	16
Wis. Stat. Ann. § 45.28 (West 1979 & Supp. 1984-85)	16
Regulations:	
Fed. R. Civ. P. 65	2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel, and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellants,

vs.

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

Pertinent Opinions Below

On February 15, 1985, the United States Court of Appeals for the Second Circuit rendered its decision and entered judgment. (A-1). This decision is reported. *Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d 266 (2d Cir. 1985) ("*Soto-Lopez II*"). On March 8, 1984, the United States District Court for the Southern District of New York rendered a decision granting the cross-motion of defendants for summary judgment and dismissed the complaint. ("*Soto-Lopez I*") (A-37). This decision is not reported.

Jurisdiction

This is an individual civil action for declaratory and injunctive relief pursuant to the fourteenth amendment to the United States Constitution and 42 U.S.C. § 1983 (1982) and for costs, disbursements and attorney's fees pursuant to 42 U.S.C. § 1988 (1982). The United States Court of Appeals for the Second Circuit held that article V, § 6 of the New York State Constitution and § 85(1)(a) of the New York State Civil Service Law were invalid under the United States Constitution. The plaintiffs asserted that the district court had jurisdiction under 28 U.S.C. §§ 1343(3), (4); 2201, 2202 (1982) and Fed. R. Civ. P. 65.

The court of appeals entered judgment on February 15, 1985. (A-38). No party sought a rehearing. The Attorney General of the State of New York filed a timely notice of appeal to this Court on May 10, 1985, in the United States Court of Appeals for the Second Circuit. (A-39).

This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The court below concluded that the challenged New York State constitutional and statutory provisions denied plaintiffs equal protection of the laws under the fourteenth amendment and the right to travel in violation of the United States Constitution. The source of the latter right has been variously attributed to the privileges and immunities clause of article IV, the commerce clause and the privileges and immunities clause of the fourteenth amendment. For the convenience of the Court, each of these provisions is set forth below. The current versions of the New York constitutional and statutory provisions challenged by appellees are set forth below.

U.S. Const. art. I, § 8:

> The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[ ]. . . .

U.S. Const. art. IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . .

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Const. art. V, § 6 (McKinney 1969):

> Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including

cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

N.Y. Civ. Serv. Law § 85(1)(a) (McKinney 1983):

1. Definitions.

(a) The terms "veteran" and "non-disabled veteran" mean a member of the armed forces of the United States who served therein in time of war, who was

honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion or at the time of retention, as the case may be.

STATEMENT OF THE CASE

1. Facts Material To Consideration Of The Questions Presented

The material facts are not in dispute. Both Soto-Lopez and Baez-Hernandez ("plaintiffs") are American citizens born in Puerto Rico. *Soto-Lopez II* (A-4). Each plaintiff resided in the Commonwealth of Puerto Rico at the time of his induction into the United States Army. *Id.* (A-4). Each plaintiff is an honorably discharged veteran. *Id.* (A-4,5). Baez-Hernandez is a disabled veteran. *Id.* (A-4). Each plaintiff became a resident of New York State after his discharge from the army. *Id.* (A-4,5). Both took New York City Civil Service competitive examinations and received additional points based on their claims that they were veterans. *Id.* (A-4,5). The New York City Civil Service Commission subsequently cancelled the awards when it discovered that they were not New York State residents when they entered the army. *Id.* (A-4-5). The cancellation of the awards led to lower places on the eligibility lists compiled from the examinations. Apparently, Baez-Hernandez eventually received a civil service appointment from one of the eligibility lists, but he claims that his appointment was substantially delayed, with a resulting loss in wages and seniority, due to the denial of additional veteran preference credit. *Id.* (A-5). As of the time the appeal was argued, Soto-Lopez had not received a civil service appointment. (A-5).

2. The Course Of Proceedings And Disposition In The Courts Below

On February 22, 1983, the plaintiffs initiated this action as individuals under 42 U.S.C. § 1983 (1982). The complaint alleges

that article V, § 6 and § 85(1)(a), insofar as they provide that residents of the State of New York who enter the armed forces while residents are eligible for veteran preference points in subsequent civil service examinations, deny plaintiffs the equal protection of the laws and their right to travel in violation of the Constitution of the United States. *Soto-Lopez II* (A-6).

Plaintiffs sought declaratory and injunctive relief. *Id.* (A-6). By a notice of motion dated October 11, 1983, plaintiffs moved for summary judgment. The Attorney General filed an affidavit in opposition to the plaintiffs' motion for summary judgment and the defendants cross-moved for summary judgment. On March 8, 1984, the district court granted defendants' cross-motion for summary judgment. *Soto-Lopez I* (A-37).

Plaintiffs filed a notice of appeal on April 4, 1984. On February 15, 1984, the court of appeals reversed the district court. *Soto-Lopez II* (A-1). Although this Court held in *August v. Bronstein*, 417 U.S. 901 (1976), that the New York veteran preference provisions challenged here did not deny veterans equal protection or violate their right to travel, the court below believed that *August* was no longer binding precedent in light of this Court's decision in *Zobel v. Williams*, 455 U.S. 55(1982), invalidating on equal protection grounds an Alaska statute which distributed oil revenues from state-owned land to its citizens based on the *length* of their residence. *Soto-Lopez II* (A-16). The court below concluded that article V, 6 and § 85(1)(a) denied plaintiffs equal protection of the law and violated their right to travel. The court of appeals ordered the district court on remand to enter declaratory and injunctive relief requiring the State and its agents to extend the veteran preference to otherwise qualifying veterans who were not residents of New York at the time they entered the armed forces. *Id.* (A-32). The court also remanded the case to the district court for further proceedings to determine whether plaintiffs in fact met all the other requirements for veteran preference credits. *Id.* (A-33-34). Judge Oakes filed a concurring opinion in which he declined to adopt the majority's equal protection rationale, but concluded that these provisions violated plaintiffs' right to travel. *Id.* (A-35). The Attorney General filed

a timely notice of appeal to this Court on May 10, 1985.* (A-39).

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTIONS PRESENTED BY THIS APPEAL

The decision by the court below holding that article V, § 6 and § 85(1)(a) violate the United States Constitution warrants reversal because it is in direct conflict with a recent decision of this Court holding that these provisions were constitutional. Moreover, this direct conflict and the impact on hundreds of thousands of employees and veterans in New York and at least 15 other states renders the questions presented here so substantial as to require plenary consideration by this Court.

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE DECISION IS IN DIRECT CONFLICT WITH *AUGUST v. BRONSTEIN*, 417 U.S. 901 (1974), IN WHICH THIS COURT HELD THAT THE CHALLENGED PROVISIONS WERE CONSTITUTIONAL.

A. The Decision of the Court Below Is In Direct Conflict With *August v. Bronstein*

This appeal merits plenary consideration because the decision of the court below is in direct conflict with a decision of

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* The plaintiffs raised the first question presented on this appeal in their complaint by alleging that the veteran preference provisions denied them equal protection and violated their right to travel. The district court rejected their contentions in its Endorsed Memorandum on March 8, 1984. *Soto-Lopez I* (A-37). The plaintiffs raised the second question presented in their Memorandum of Law in Opposition to Defendants' Motion to Dismiss when they claimed that *Zobel v. Williams*, 457 U.S. 55 (1982), overruled *August v. Bronstein*, 417 U.S. 901 (1974). The district court rejected these claims in the same Endorsed Memorandum. *Soto-Lopez I* (A-37).

In their appeal to the court of appeals, the plaintiffs raised the first and second questions presented on this appeal in the Brief of Plaintiffs-Appellants at ii and 6. The court of appeals answered both questions affirmatively in its decision. *Soto-Lopez II* (A-1).

this Court. *See Dombrowski v. Pfister*, 380 U.S. 479, 483 (1965) (noting probable jurisdiction "in order to resolve a seeming conflict with our later decision in *Baggett v. Bullit*, 377 U.S. 360 [1964]"). This Court, less than a dozen years ago, held that the same veteran preference provisions challenged here, article V, § 6 and § 85(1)(a),* were constitutional in the face of identical challenges. *August v. Bronstein*, 417 U.S. 901, *aff'g mem.*, 369 F.Supp. 190 (S.D.N.Y. 1974) (three-judge court). In that case, the plaintiffs, current New York residents who had enlisted in the armed forces while residing outside the state, sought a declaratory judgment holding that these provisions denied them the equal protection of the laws and violated their right to travel. The district court unanimously rejected these contentions. It stated that the preference compensated New York veterans " 'in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces.' " 369 F.Supp. at 193 (quoting *Russell v. Hodges*, 470 F.2d 212, 218 (2d Cir. 1972) (Friendly, J.)). In addition, it was "a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the state thereafter." 369 F.Supp. at 193. Since the "modest" veteran credit was substantially related to these legitimate state purposes, it did not deny plaintiffs equal protection. The court also held, based on this Court's decisions in *Sturgis v. Washington*, 414 U.S. 1057 (1973), and *Spatt v. New York*, 414 U.S. 1058 (1973), that this limited *non-durational* preference did not infringe or penalize the right to travel. *Id.* at 194-95. This Court summarily affirmed. 417 U.S. 901.

* Section 85(1)(a) was amended in 1982. The amendment did not modify the requirement of residency at the time of entry into the armed forces. Before 1982, only citizens of the state were eligible under article V, § 6 and § 85(1)(a) for veteran preference credit. In 1979, a federal district court held that restriction of the preference to citizens and denying it to legally resident alien veterans violated the equal protection clause. *Andrade v. Nadel*, 477 F.Supp. 1275 (S.D.N.Y. 1979). As a result, New York amended § 85(1)(a) to include lawful permanent resident aliens within the definition of "veteran." Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 499, 501.

This Court's summary affirmance in *August* was a decision on the merits of plaintiffs' constitutional claims. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Ohio ex rel. Easton v. Price*, 360 U.S. 246, 247 (1959). Therefore, since the plaintiffs' appeal to this Court in *August* presented precisely the same claims raised in this case by plaintiffs in the court of appeals, this Court's summary affirmance is binding precedent until this Court overrules *August*, explicitly or implicitly. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. at 344-45. This Court stated in *Hicks*, " 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question unsubstantial, it remains so except when doctrinal developments indicate otherwise.' " 422 U.S. at 344 (quoting *Port Authority Bondholders Protective Committee v. Port of New York Authority*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)). The court of appeals recognized this settled law, but concluded that this Court's decision in *Zobel v. Williams*, 457 U.S. 55 (1982), was such a doctrinal development and that *August* no longer constituted binding precedent. *Soto-Lopez II* (A-13-14). As demonstrated below, this conclusion is without merit.

B. *Zobel v. Williams*, 457 U.S. 55 (1982), Did Not Overrule *August v. Bronstein*.

Zobel v. Williams did not develop any new doctrine which explicitly or implicitly overruled *August v. Bronstein*. In *Zobel*, this Court simply applied well-settled principles set forth in two pre-*August* decisions to strike down *durational* residency requirements for obtaining cash benefits. It has no applicability to the *non-durational* residency requirements for civil service positions in the New York provisions* which this Court held were constitutional only six years earlier in *August*.

* This Court has expressly stated that the New York provisions are "nondurational." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 263 n.9 (1979).

In *Zobel*, the plaintiffs challenged a 1980 Alaska statute which distributed income derived from oil revenues on state-owned land in Prudhoe Bay to adult citizens of the state in varying amounts based on the *length* of residence on grounds that the statute denied them equal protection and violated their right to travel. The Alaska Supreme Court rejected both claims. *Zobel v. Williams*, 619 P.2d 448 (Alaska 1980). This Court reversed and found that the statute violated the equal protection clause. 457 U.S. at 56. It did not reach the right to travel claim. *Id.* at 60 n.6.

Under the Alaska plan, each year the state distributed from a Permanent Fund a portion of the earnings (one dividend unit for each year of residence since 1959, the first year of statehood) directly to the state's adult residents. This Court concluded that since the statute distributed benefits unequally, the distinctions were subject to equal protection analysis and subjected the statute to rational basis scrutiny.*

The state advanced three purposes justifying the distinctions made by the dividend program:

> (a) creation of a financial incentive for individuals to establish and maintain residence in Alaska; (b) encouragement of prudent management of the Permanent Fund; and (c) apportionment of benefits in recognition of *undefined* "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency," 619 P.2d, at 458.

457 U.S. at 61 (footnote omitted, emphasis supplied). This Court accepted for purposes of the appeal that the first two purposes were legitimate, but concluded that they were not rationally served by the distinctions based on duration of residence. *Id.* at 62-63. This Court determined that Alaska's third purpose—

* In light of this Court's conclusion that the statute did not survive the rational basis test, it did not determine whether the statute was sufficiently "invidious" to subject it to "more rigorous scrutiny." 457 U.S. at 60.

apportionment of benefits based on *undefined past* contributions—was not a legitimate purpose. *Id.* at 63. The grounds for this conclusion were two pre-*August* decisions, *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Vlandis v. Kline*, 412 U.S. 441 (1973), which involved distribution of benefits based on *length* of residence, not access to civil service employment.

Despite some broad *dicta* involving other state activity,* the holding in *Zobel* was narrow: The award of cash dividends for *undefined past* contributions based on *length* of residence did not rationally advance a legitimate state purpose. This Court carefully explained the narrow nature of this holding: "Apportionment would thus be prohibited *only* when it involved 'fundamental rights'** and services deemed to involve 'basic necessities of life.' " 457 U.S. at 64 n.11 (emphasis supplied). Furthermore, this Court declined to consider whether the state could enact the dividend program prospectively only. *Id.* at 64. Thus, the decision in *Zobel* has no effect on the validity of *August* where the statutory eligibility for awards of veteran preference

* This Court asked rhetorically:

> If the states can make the amount of a cash dividend depend on *length* of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by *length* of domicile? Could states impose different taxes based on *length* of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to *length* of residency.

457 U.S. at 64 (footnote omitted, emphasis supplied). The quotation demonstrates that this Court was solely concerned with *durational* residency requirements, unlike those at issue here.

** "[T]here is no fundamental right to government employment for purposes of the Equal Protection Clause." *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of Camden*, 104 S. Ct. 1020, 1028 (1984).

credit is based on precisely defined contributions at a particular time, rather than on duration of residence, and the provisions operate largely prospectively.*

Nevertheless, the court below regarded the *Zobel* Court's interpretation of the equal protection clause "as evincing several doctrinal developments that undercut the holding in *August v. Bronstein*" and, therefore, that it was "free to examine with a fresh eye the equal protection challenge to the New York provisions." (A-18). None of the supposed "doctrinal developments" in *Zobel* cited by the court below have merit.

First, the court reads *Zobel* "as having implications for both durational and nondurational distinctions, for the Alaska statute not only increased the amount of the dividend based on the length of residency, it limited the awards to residence at a particular past time." *Soto-Lopez II* (A-16-17). Although the *Zobel* majority noted that the Alaska statute discriminated "among long-time residents and even native-born residents," 457 U.S. at 59-60 n.5, since an Alaska resident who was not such in 1960 because he was not born until 1962 would never be given a dividend for 1960, *Soto-Lopez II* (A-17), the *Zobel* majority did not base its decision on the difference in awards based on date of birth but, as it repeatedly made clear, on the differences based on *length* of residence.** The benefits under the Alaska statute

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* Article V, § 6 is primarily prospective in application. Section 85(1)(a) simply implements it. Together they provide that current residents who enter the armed forces immediately become eligible at the time they enter the armed forces for future veteran preference credit if they pass a competitive civil service examination. All New York residents who entered the armed forces during the Second World War became eligible for future veteran preference credit upon entry if they became disabled during the war. N.Y. Const. art. V, § 6 (1929) (amended 1945). All New York residents who entered the armed forces after 1945 became eligible upon entry for future credit on civil service examinations if they served during time of war, even if they did not become disabled. N.Y. Const. art. V, § 6 (1945) (amended 1949).

** Under the analysis of the court below, it would deny equal protection of the law if a state awarded a benefit to all residents in the state on the date of distribution but denied this one-time benefit to all future residents. This would severely restrict the power of the state to distribute any one-time benefit for fear that it would require distribution to all future residents.

were distributed *pro rata* based on length of residency which is entirely different from the vesting of eligibility for awards of civil service credit to those residents who enter the armed forces at a particular time. The reading of the court below would mean that *anytime* a state distinguished between residents based on the date of an act, it would be constitutionally suspect. No such conclusion is "implicit" in the majority opinion.*

Second, the court below claimed that the *Zobel* Court's statement that rewarding residents for past contributions is not a legitimate state purpose undercuts the *August* court's conclusion that the New York provisions were valid because they were simply a token of gratitude for the wartime service performed by New York residents. *Soto-Lopez II* (A-17). This misrepresents the basis of the *August* court's decision. The court found that the veteran preference credit served *three* legitimate state purposes. First, it compensated its residents who entered the armed forces " 'in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces.' " 369 F.Supp. at 193 (quoting *Russell v. Hodges*, 470 F.2d at 218). Second, it encouraged such residents to return to the service of the state after service in the armed forces. 369 F.Supp. at 193. Third, it was "a token of gratitude conferred by New York upon its sons who enter their country's service in time of war." *Id.*

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* The reliance on the concurring opinion of four Justices is not only irrelevant for determining whether *August* is still good law, but misplaced. The concurring opinion carefully distinguished those *durational* residency requirements which denied equal protection from distinctions among residents based on presence in the state *at a particular time* which did not necessarily deny equal protection:

> The Fourteenth Amendment does, however, expressly recognize one elementary basis for distinguishing between persons who may be within a State's jurisdiction at *any particular time* by setting forth the requirements for state citizenship.

457 U.S. at 69 (emphasis supplied).

Compensation of its residents for the disruption to their lives caused by service in the armed forces surely is a legitimate state purpose and nothing in *Zobel* suggests otherwise. Encouragement of its residents to stay in the state also is a legitimate state purpose. Indeed, the *Zobel* Court accepted, for purposes of the appeal, that this was a legitimate purpose. 457 U.S. at 62. Furthermore, the *Zobel* Court did *not* hold that all rewards for *any* past contributions were illegitimate.* Rather, it simply held that Alaska's apportionment of benefits in recognition of past "*undefined* 'contributions of various kinds, both tangible and intangible, which residents have made during their years of residency' " was not a legitimate state purpose. Here, however, eligibility for the veteran preference credit not only vests contemporaneously with entry into the armed forces, but is based on a precisely defined contribution: service in the armed forces in time of war.**

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* Indeed, the concurring opinion by Justice Brennan recognized that the state was not precluded from rewarding *all* past contributions:

> The past actions of individuals may be relevant in assessing their present needs; past actions may also be relevant in predicting current ability and future performance. In addition, to a limited extent, *recognition and reward of past public service have independent utility for the State*, for such recognition may encourage people to engage in comparably meritorious service.

457 U.S. at 70-71 (emphasis supplied). *See also id.* at 69 n.3. The defect in Alaska's durational residence classifications was that "the length of residence has only the most tenuous relation to the *actual* service of individuals to the State." *Id.* at 71 (emphasis in original). Here, the veteran preference credit is not durational and is a modest effort to compensate the resident's public service to the state and nation. Justice O'Connor also concluded that not all rewards for past contributions were invalid and expressly singled out rewards for prior community service as "valid goals." 457 U.S. at 72 n.1.

** In any event, as this Court recognized in *Zobel*, the summary affirmance in *August* "is not to be read as an adoption of the reasoning supporting the judgment under review." 457 U.S. at 64 n.13. Therefore, absent a showing that the decision in *Zobel* undercut *any* basis for the decision on the merits in *August*, *August* is still binding.

Third, the court below contended that the *August* court concluded that the preference was too modest to violate the equal protection clause and that this view had "been seriously undermined by *Zobel*, where the value of each dividend, at the time, was $50 per year of residency." *Soto-Lopez II* (A-17). The *August* court, however, did not conclude that the veteran preference was substantially related to the state's purpose simply because it was "modest," but, as Judge Friendly declared, because

> [t]he desire to compensate in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces and to express gratitude for such service is a rational basis for giving veterans a larger measure of job security. . . .

369 F.Supp. at 193 (quoting *Russell v. Hodges*, 470 F.2d at 218).

In addition, the court below felt that it was "free also to review, without the constraints of *August*, the plaintiffs' challenge to the New York provisions as an undue burden on the right to travel," *Soto-Lopez II* (A-19), because five Justices in two concurring opinions expressed the view that the Alaska statute violated the plaintiffs' constitutional right to travel. Neither *Tully* nor *Hicks*, however, authorize lower courts to disregard this Court's decisions based on views expressed by individual Justices in concurring opinions which have not been accepted by the Court.

In any event, the court below misrepresents the basis of the *August* court's decision that the veteran preference provisions did not violate the right to travel. It claims that "[t]he *only* basis expressed by the *August* court for this ruling was that the bonus awarded under the New York scheme conferred so limited a benefit that it could not realistically be held to penalize the right to travel." *Soto-Lopez II* (emphasis supplied) (A-19). On the contrary, the *August* court held that they did not violate the right to travel both because they did not involve *durational* residence requirements, 369 F.Supp. at 195, and because under

this Court's decisions in *Sturgis v. Washington* and *Spatt v. New York* they could not "realistically be held to infringe or penalize the right to travel." 369 F.Supp. at 194. *Zobel* did not, of course, undermine the first rationale because it expressly stated that the defect in the Alaska statute was that it contained an impermissible *durational* residency requirement. Nor has this Court ever overruled *Sturgis* or *Spatt*.

As demonstrated by the foregoing, there is no "doctrinal development" in *Zobel* which undercuts this Court's holdings in *August* that article V, § 6 and § 85(1)(a) did not deny veterans the equal protection of the law or violate their right to travel. Therefore, *August* remains binding precedent on the court below and this Court should summarily reverse or grant plenary consideration to resolve the direct conflict.

II. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUES ARE OF GREAT IMPORTANCE TO HUNDREDS OF THOUSANDS OF STATE AND LOCAL CIVIL SERVICE EMPLOYEES IN MANY STATES.

This appeal also merits plenary consideration to resolve important questions concerning the validity of veteran preference statutes in at least 15 other states.* *See Dombrowski v. Pfister*,

* For example, each of the following states award benefits to veterans who were residents at the time they entered the armed forces: Alabama, Ala. Code § 31-6-11 (1983); Alaska, Alaska Stat. §§ 26.15.130, 26.15.140, 26.15.150 (1978); Connecticut, Conn. Gen. Stat. Ann. § 27-103(b)(West 1958); Delaware, Del. Code Ann. tit. 29, § 5935(Michie 1975); Florida, Fla. Stat. Ann. § 295.01(West Supp. 1985); Indiana, Ind. Code Ann. § 10-5-16.5-1 (Burns 1981); 10-24-1 (Burns Supp. 1984); Kentucky, Ky. Rev. Stat. Ann. § 40.010(Michie 1980 & Supp. 1984); Louisiana, La. Rev. Stat. Ann. § 29.293 (West 1975); Maine, Me. Rev. Stat. Ann. tit. 37-B §§ 504, 505 (West Supp. 1984); Michigan, Mich. Comp. Laws Ann. 35.1001, 35.1022 (West Supp. 1984); Mississippi, Miss. Code Ann. § 35-7-5 (Law. Co-op. 1972); Oregon, Or. Rev. Stat. § 408.010 (1983); Rhode Island, R.I. Gen. Laws §§ 36-3-3(10), 36-4-19 (Michie 1984); South Dakota, S.D. Codified Laws Ann. § 33-16-1 (Allen Smith 1976); Wisconsin, Wis. Stat. Ann. § 45.28 (West 1979 & Supp. 1984-85).

380 U.S. at 483 (noting probable jurisdiction "to settle important questions concerning federal injunctions against state criminal prosecutions threatening constitutionally protected expression."). The resolution of these questions will have an impact on hundreds of thousands of civil service employees in this and other states.

In New York State alone there are approximately three quarters of a million state and local governmental employees in the civil service.* In addition, the state processes over a quarter of a million applications for competitive civil service positions each year. Abolition of the residency requirement for the veteran preference will affect employees and applicants directly and indirectly with regard to applications, promotions, seniority and lay-offs.

* Approximately 225,973 people work for the state and 200,267 work for New York City. The remaining 325,305 work for other municipalities.

Conclusion

The issues presented are important. The decision of this Court on this appeal will have a widespread impact on hundreds of thousands of employees in the civil service of New York and other states. The decision of the court below is in direct conflict with *August v. Bronstein*, 417 U.S. 901 (1974), in which this Court held that article V, § 6 of the New York State Constitution and § 85(1)(a) of the New York State Civil Service Law were constitutional.

For all the foregoing reasons, this Court should summarily reverse or grant plenary consideration of the substantial questions presented by this appeal.

Dated: New York, New York
May 15, 1985

Respectfully submitted,

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APPENDIX

APPENDIX

		Page
A	Opinions, orders, findings of fact and conclusions of law delivered upon the rendering of the judgment by the court below:	
	Opinion of the United States Court of Appeals for the Second Circuit in *Soto-Lopez v. New York City Civil Service Commission*, No. 85-7325 (2d Cir. Feb. 15, 1985)	A-1
B	Other opinions, orders, findings of fact and conclusions of law rendered by courts in the case:	
	Endorsed Memorandum of the United States District Court for the Southern District of New York in *Soto-Lopez v. New York City Civil Service Commission*, No. 83 Civ. 1370 (RO) (S.D.N.Y. Mar. 8, 1985)	A-37
C	Judgment appealed from:	
	Final Judgment of United States District Court for the Southern District of New York in *Soto-Lopez v. New York City Civil Service Commission*, No. 83 Civ. 1370 (RO) (S.D.N.Y. Mar. 14, 1984) ...	A-38
D	Notice of appeal:	
	Notice of Appeal from the United States Court of Appeals for the Second Circuit to the Supreme Court of the United States by the Attorney General of the State of New York, filed May 10, 1985 .	A-39

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 38 — August Term, 1984

(Argued: Sept. 19, 1984 Decided: Feb. 15, 1985)

Docket No. 84-7325

EDUARDO SOTO-LOPEZ and ELIEZER BAEZ-HERNANDEZ,
Plaintiffs-Appellants,

—v.—

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel,
Defendants-Appellees,

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Defendant-Intervenor-Appellee.

Before:

OAKES, KEARSE, and PRATT, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, dismissing complaint challenging

constitutionalty of N.Y. Const. art. V, § 6, and N.Y. Civ. Serv. Law § 85(1)(a) (McKinney 1983) insofar as they deny veteran preference points on civil service examinations to New York resident veterans who were not New York residents at the time of entry into the armed forces.

Reversed and remanded.

Judge Oakes concurs, in a separate opinion.

ROBERT L. BECKER, New York, New York (Jorge Batista, Puerto Rican Legal Defense & Education Fund, Inc., New York, New York, on the brief), *for Plaintiffs-Appellants.*

ROBERT ABRAMS, Attorney General of the State of New York, New York, New York (Brenda S. Spears, Assistant Attorney General, Frederick Mehlman, Assistant Attorney General, New York, New York, of counsel), *submitted a brief for Defendant-Intervenor-Appellee.*

FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, New York, New York (Gillian Sacks, New York, New York, of counsel), *for Defendants-Appellees, joined the brief of Defendant-Intervenor-Appellee.*

KEARSE, *Circuit Judge*:

The State of New York (the "State"), through article V, § 6, of its Constitution and § 85 of its Civil Service Law, provides that a New York resident who passes a civil service examination, who is a veteran of the United States armed forces, and who meets certain other criteria will have points added to his score if he was a resident of New York at the time he entered the armed forces. Plaintiffs Eduardo Soto-Lopez and Eliezer Baez-Hernandez, veterans residing in New York who claim to have met all of the criteria of those provisions except that of New York residence at the time of their entrance into the armed forces, appeal from a final judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, granting the motion of defendants New York Civil Service Commission, *et al.*, to dismiss their complaint, brought under 42 U.S.C. § 1983 (1982), challenging the past-residency requirement of the New York provisions as violative of their right to equal protection under the Fourteenth Amendment to the United States Constitution and of their constitutionally protected right to travel. Relying on *August* v. *Bronstein*, 369 F. Supp. 190 (three-judge court), *aff'd mem.*, 417 U.S. 901 (1974), which decided the very questions at issue here, the district court held that the New York provisions infringed neither constitutional right. Plaintiffs contend that *August* v. *Bronstein* was implicitly overruled by *Zobel* v. *Williams*, 457 U.S. 55 (1982), and that *Zobel* requires that the past-residency requirement of the New York provisions be invalidated as both a denial of equal protection and a burden on the right to travel because the practice is not rationally related to a legitimate or compelling state purpose. We agree and therefore reverse the judgment of the district court and remand for further proceedings.

I. Background

A. *Facts*

For purposes of the present appeal, the facts do not appear to be in substantial dispute. Both Soto-Lopez and Baez-Hernandez are American citizens born in Puerto Rico; each resided in Puerto Rico at the time of his induction into the United States Army. Baez-Hernandez entered the army in 1958 and served on active duty until 1960. He became a resident of New York State in 1968 and has resided in New York continuously since that time. In 1970 he was recalled to active duty for 15 days, during which he suffered an injury that left him partly disabled. Baez-Hernandez was honorably discharged after both periods of active duty.

In 1980, Baez-Hernandez took the New York City ("NYC") Civil Service competitive examination for the position of Human Resources Specialist and received a score of 77.3. In response to his claim that he was a disabled veteran, Baez-Hernandez was preliminarily awarded 10 additional points—5 for veteran status, and 5 for his service-related disability—thereby raising his score to 87.3. Based on the adjusted score, Baez-Hernandez received an appointment as a Human Resources Specialist on about June 1, 1981. The award of the 10 bonus points was rescinded two days later, however, and the appointment withdrawn, when it was discovered that Baez-Hernandez was not a New York resident at the time of his entry into the army.

In 1981, Baez-Hernandez took NYC Civil Service competitive examinations for the positions of O.C. Research Assistant and Assistant Accountant, with similar results. In each case, he was preliminarily awarded 10

additional points based on his claim that he was a disabled veteran; in each case the award was rescinded upon the discovery that he was not a New York resident when he entered the army. The cancellation of the 10-point bonus led to Baez-Hernandez's name being placed substantially lower on the eligibility lists compiled from the examinations. Apparently, Baez-Hernandez eventually received an appointment to a civil service position from one of these lists. However, he contends that his appointment was substantially delayed, with a concomitant loss of wages and seniority, due to defendants' refusal to grant him the 10 veteran preference points he claimed.

Soto-Lopez entered the army in 1961 and was honorably discharged from active duty in 1963. He became a resident of New York in 1965. In 1980, he took the NYC Civil Service competitive examination for the position of Housing Caretaker, receiving a score of 88. Based on his claim to veteran status he was provisionally granted 5 additional points, thereby raising his score to 93. In December 1982, Soto-Lopez was called for interviews for a Housing Caretaker position. However, upon the discovery that he was not a New York resident at the time of his entry into the army, the 5 bonus points were cancelled, his name was accordingly placed significantly lower on the eligibility list, and he was no longer considered for the position. At the time this appeal was argued, Soto-Lopez had not been appointed to a civil service position.

B. *The Proceedings Below*

Plaintiffs' complaint, brought under 42 U.S.C. § 1983, recited the above facts and claimed that the

application of N.Y. Const. art. V, § 6, and N.Y. Civ. Serv. Law § 85(a)(1) (McKinney 1983) to deny them the additional points accorded to those New York resident veterans who were New York residents at the time they entered the armed forces violated the Equal Protection Clause of the Fourteenth Amendment and the constitutionally protected right to travel. They sought declaratory and injunctive relief and retroactive employment benefits.[1]

After a number of procedural steps eventually culminating in the intervention by the Attorney General of the State of New York as a defendant, plaintiffs moved for summary judgment granting the relief requested in their complaint, and defendants cross-moved for summary judgment in their favor. In support of their motion, plaintiffs pointed out that the challenged provisions created a distinction between two classes of New York resident veterans, i.e., those veterans who were residents of the state at the time they entered the armed forces and those veterans who were not, with only the former class entitled to veteran preference points. Plaintiffs argued (1) that this distinction was not rationally related to a legit-

[1] The complaint requested judgment (1) declaring that the denial of additional points to otherwise qualifying veterans who were not residents of New York at the time of their entry into the armed forces violated the Equal Protection Clause and the right to travel; (2) permanently enjoining defendants from denying such veterans the additional points; (3) requiring that defendants (a) grant Soto-Lopez 5 additional points on his examination score, (b) grant Baez-Hernandez 10 additional points on each of his examination scores, (c) adjust both Soto-Lopez's and Baez-Hernandez's positions on the respective eligibility lists so as to reflect these higher scores, (d) immediately appoint Soto-Lopez and Baez-Hernandez to the civil service positions for which they had taken examinations, and (e) award them retroactive seniority and back pay; (4) granting plaintiffs costs, disbursements, and attorney's fees pursuant to 42 U.S.C. § 1988 (1982); and (5) granting such further relief as the court might deem proper.

imate state purpose and therefore violated the Equal Protection Clause; and (2) that the effect of the provisions was to give certain long-term residents priority over newer residents, without any compelling state interest in such a priority, and thus to burden impermissibly the constitutionally protected right to travel. Plaintiffs urged the court to rule that *August* v. *Bronstein*, which had upheld the New York distinction as a modest token of gratitude to residents of the State for their past contributions to the State in time of war, had been implicitly overruled by *Zobel* v. *Williams*, which plaintiffs construe as holding that "'reward[ing] citizens for past contributions . . .[is an] objective [that] is not a legitimate state purpose.'" (Plaintiffs' brief on appeal at 6 (quoting *Zobel* v. *Williams*, 457 U.S. at 63).)

After receiving arguments from both sides as to the continuing vitality of *August* and the legitimacy of New York's purposes in maintaining the challenged distinction, the district court rejected the contention that *August* v. *Bronstein* had been overruled by *Zobel* v. *Williams*. The court held, following *August*, "that it is neither an infringement on the rights of a resident of another state to travel, nor of equal protection of the laws for New York to promise to its own sons and daughters departing for wartime service in the armed forces that upon their honorable return, they are entitled to a modest civil service hiring advantage." Accordingly, it granted defendants' motion to dismiss the complaint.

This appeal followed.

II. Discussion

On appeal, plaintiffs renew the constitutional challenges they made in the district court. For the reasons

below, we find merit in both the equal protection and the right-to-travel arguments and accordingly reverse the judgment dismissing the complaint. We remand to the district court for the granting of declaratory and injunctive relief and for further proceedings on other issues relating to plaintiffs' claims for individual relief.

A. *The Statutory Scheme*

Article V, section 6, of the New York State Constitution provides that:

> [a]ppointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state *and was a resident at the time of his entrance into the armed forces of the United States* and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points

> additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

(Emphasis added.)

Section 85(1)(a) of the New York Civil Service Law, implementing this constitutional provision, defines a veteran as

> a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, *who was a resident of this state at the time of entrance into the armed forces of the United States* and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion . . . as the case may be.

(Emphasis added.) Section 85(2)(a) provides, *inter alia*, that disabled veterans shall receive 10 additional points on civil service competitive examinations for original appointment and 5 additional points on civil service competitive examinations for promotion, and that nondisabled veterans shall receive 5 and 2½ additional points respectively on such examinations.

No question has been raised as to plaintiffs' satisfaction of all of the requirements of § 85 other than the

requirement that they have been residents of New York at the time of their entrance into the armed services.

B. August v. Bronstein

August v. *Bronstein*, 369 F. Supp. 190, is apparently on all fours with the present case.[3] The *August* plaintiffs were veterans who were then residents of New York but who had not been residents of New York when they entered the armed services. They met all of the other requirements of § 85 of the Civil Service Law, and they challenged the provisions of that law and of the New York Constitution that awarded veteran preference points only to those veterans who had been residents of New York at the time they entered the armed services, contending that those provisions violated their right to equal protection and their constitutional right to travel.

The three-judge court convened to rule on these constitutional challenges upheld the New York provisions, finding that they violated neither the Equal Protection Clause nor the right to travel. The court stated that "'the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute.'" 369 F. Supp. at 193 (quoting *Boraas* v. *Village of Belle Terre*, 476 F.2d 806, 814 (2d Cir. 1973) (emphasis in original), *rev'd*, 416 U.S. 1 (1974)). After tracing the history of the veteran preference in New York, the *August* court stated that the purpose of the classification was "apparent":

> The preference is a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the State thereafter.

369 F. Supp. at 193. The court concluded that "the modest veterans' preference at issue here is substantially related to the purposes of the State." *Id.*

In reaching that conclusion, the *August* court relied principally on *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972), which had upheld, in the face of an equal protection challenge, a New York statute that provided that an employee who was a wartime veteran would be granted a pretermination hearing before being fired from a civil service position while a peacetime veteran would not.[4] *Russell*, which did not involve the veteran's residence, reasoned that the State could rationally base the distinction challenged there on the premise that services performed

[3] Section 85(1)(a) of the Civil Service law has been amended since *August* v. *Bronstein* in a respect that is not material here. Prior to 1982, both that section and the New York Constitution granted a veteran preference only to current "citizen[s]" of the state. In 1979, the restriction of the preference to citizens, denying it to legally resident alien veterans, was held to violate the Equal Protection Clause. *Andrade* v. *Nadel*, 477 F. Supp. 1275 (S.D.N.Y. 1979). In consequence, in 1982, § 85(1)(a) was amended to bring lawful permanent resident aliens within the definition of "veteran." Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 499, 501.

[4] The *August* court also relied on *Gianatasio* v. *Kaplan*, 142 Misc. 611 (Sup. Ct. N.Y. County), *aff'd mem.*, 257 N.Y. 531 (1931), *dismissed for want of a substantial federal question*, 284 U.S. 595 (1932), which had upheld the provisions under attack here, using, at least in part, a "right/privilege" analysis. The *August* court did, however, acknowledge that the right/privilege rationale of that decision had been substantially undermined by subsequent Supreme Court decisions such as *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).

None of the parties has addressed the continuing vitality of *Gianatasio* v. *Kaplan*, and, given the virtually complete transformation of equal protection analysis in the past half century and the abandonment of the right/privilege distinction upon which that decision relied, we conclude that *Gianatasio* need not be separately addressed. *See Andrade* v. *Nadel*, 477 F. Supp. at 1278.

and hardships undergone by servicemen in wartime were greater than those performed and undergone by servicemen in peacetime.

The *August* court distinguished *Carter* v. *Gallagher*, 337 F. Supp. 626 (D. Minn. 1971), and *Stevens* v. *Campbell*, 332 F. Supp. 102 (D. Mass. 1971) (three-judge court), both of which had struck down residency classifications in state civil service veteran preference statutes, and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), which had struck down one-year residency requirements for welfare and voting respectively, on the ground that the classifications in those cases were based on durational residency requirements. The court pointed out that the New York scheme was different because the New York classification was not based on duration of residency but "require[d] only that the veteran be a resident *at the time* of induction and a resident and citizen *at the time* he claims the preference." 368 F. Supp. at 194 (emphasis in original). The court also distinguished *Stevens* on the ground that the preferences accorded veterans in that case were "substantially greater." *Id.* at 194-95.

Finally, the court concluded that the preference granted under the New York laws was too limited to be held realistically to infringe or penalize the right to travel. In so ruling, the court noted the then-recent summary affirmances by the Supreme Court in *Sturgis* v. *Washington*, 414 U.S. 1057 (1973), *aff'g* 368 F. Supp. 38 (W.D. Wash. 1973) (three-judge court), upholding a state statute authorizing lower state college tuition for students who had been bona fide residents of the state for other than educational purposes for one year prior to registration in the state school, and *Spatt* v. *New York*,

414 U.S. 1058 (1973), *aff'g* 361 F. Supp. 1048 (E.D.N.Y. 1973) (three-judge court), upholding a statute that restricted eligibility for state scholarship assistance to students enrolled in an approved institution within the state.

The *August* plaintiffs appealed directly to the Supreme Court, pursuing their contentions that the New York provisions denied them equal protection and violated their right to travel. The Supreme Court summarily affirmed.

The summary affirmance of *August* by the Supreme Court constituted a decision on the merits of that case. *See, e.g., Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975); *Ohio ex rel. Easton* v. *Price*, 360 U.S. 246, 247 (1959). Accordingly, since the *August* plaintiffs' appeal to the Supreme Court presented precisely the questions at issue here, that affirmance constitutes binding precedent for the present case unless *August* has been overruled, explicitly or implicitly, by a subsequent Supreme Court decision. *See Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977); *Hicks* v. *Miranda*, 422 U.S. at 344-45; *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973) ("[W]e are bound by the Supreme Court's summary affirmances 'until such time as the Court informs us that we are not'" (quoting *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2d Cir.), *cert. denied*, 395 U.S. 935 (1969)).), *cert. denied*, 414 U.S. 1096 (1973). *See generally* 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 400.05-1 (2d ed. 1982). Thus, as the Supreme Court observed in *Hicks* v. *Miranda*, 422 U.S. at 344 (quoting *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 263 n.3 (2d Cir. 1967)), "'unless and until the Supreme Court should instruct otherwise, inferior federal courts

had best adhere to the view that if the Court has branded a question unsubstantial, it remains so except when doctrinal developments indicate otherwise.'"

Plaintiffs contend that the Supreme Court's 1982 decision in *Zobel* v. *Williams* is such a doctrinal development and that *August* no longer constitutes binding precedent. We agree.

C. Zobel v. Williams's *Impact on* August

In *Zobel* v. *Williams*, 457 U.S. 55, the Court considered a 1980 Alaska statute that provided for the distribution of income derived from the state's natural resources to its residents in amounts proportional to the length of their respective residence in the state since Alaskan statehood in 1959. The *Zobel* plaintiffs challenged the statute as a denial of equal protection and of their right to travel. The Alaska Supreme Court found the statute constitutional. The Supreme Court of the United States found that it violated the Equal Protection Clause; five Justices concluded that the Alaska statute also violated plaintiffs' right to travel.

1. *Equal Protection*

The Court began with the premise that scrutiny under the Equal Protection Clause of the Fourteenth Amendment is warranted whenever a state distributes benefits unequally. The Court noted that although some distinctions are subject to more rigorous scrutiny than others, it was not forced to determine whether the Alaska dividend-distribution scheme called for enhanced scrutiny because the Alaska statute—which "create[d] fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they ha[d] been in the State," 457 U.S. at 59—failed to pass even the minimum test of whether its distinctions rationally furthered a legitimate state purpose.

In support of the statutory scheme, Alaska had asserted that it furthered three state purposes, only two of which are pertinent here. First, the state argued that the scheme created a financial incentive for individuals to establish and maintain residence in Alaska. The Court held that the distinction drawn between newer and older residents was simply not rationally related to this purpose. Conceding, *arguendo*, that granting benefits to residents might provide an incentive for them to remain in Alaska, the Court pointed out that, absent such incentives, longtime residents of the state were less likely to leave the state than were newer residents; hence, the state's alleged goal would more likely be achieved if the larger monetary awards were given to the newer residents, not to the longtime residents. *Id.* at 61-62 & n.9; *see also id.* at 70 (Brennan, *J.*, concurring: "Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics" (emphasis in original).).

In addition, the state argued that the classification served to reward citizens for past contributions to the state. The Court held, relying on *Shapiro* v. *Thompson*, 394 U.S. at 632-33, and *Vlandis* v. *Kline*, 412 U.S. 441, 449-50 & n.6 (1973), that rewarding past contributions measured solely by past residence was simply not a legitimate state purpose. *Id.* at 63. It stated that

> [i]f the states can make the amount of a cash dividend depend on length of residence, what would

> preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

Id. at 64 (footnotes omitted). The Court concluded that

> [t]he only apparent justification for the . . . program, "favoring established residents over new residents," is constitutionally unacceptable. *Vlandis* v. *Kline*, *supra*, [412 U.S.] at 450. In our view Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who became residents since then.

Id. at 65. Accordingly, the Court held the challenged classification invalid.

We regard the *Zobel* Court's interpretation of the Equal Protection Clause as evincing several doctrinal developments that undercut the holding in *August* v. *Bronstein*. First, *August* concluded that the distinctions drawn by the New York provisions did not violate the Equal Protection Clause because they were not based on *duration* of residence. We read *Zobel*, however, as having implications for both durational and nondurational distinctions, for the Alaska statute not only increased the amount of the dividend based on the length of residency, it linked the awards to residence at a particular past time. As the majority pointed out, "[t]he Alaska statute also discriminates among long-time residents and even native-born residents," for an Alaska resident who was not such in 1960 because he was not born until 1962 would never be given a dividend for 1960. 457 U.S. at 59-60 n.5. We think it implicit in the majority opinion that the award of a dividend based solely upon past residency in the state at a particular time is impermissible under the Equal Protection Clause. And four of the concurring Justices stated explicitly that if the Alaska plan simply discriminated against resident 18-year-olds in favor of all residents of longer duration, "those discriminations would surely be constitutionally suspect." *Id.* at 69 (Brennan, *J.*, concurring). Thus, we read *Zobel* to mean that it is not a legitimate state purpose to confer benefits based solely on past residency at a particular time.

Second, the *August* court concluded that the New York provisions were valid because the bonus points were intended to be a token of gratitude for the wartime service that had been performed by its residents. The *Zobel* Court held that the objective of rewarding residents for past contributions is not a legitimate state purpose when the measure of such contributions is simply past residency.

Third, the *August* court concluded that the preference accorded veterans who had been New York residents at the time of their entrance into the armed services was too modest to infringe the Equal Protection Clause. *August*'s *de minimis* view too has been seriously undermined by *Zobel*, where the value of each dividend unit, at the time, was $50 per year of residency. In *August*,

the bonus of five points made a difference of nearly 70 places on the eligibility list. If the increment of a mere $50 per year of residency was sufficient to infringe the Equal Protection Clause, the denial of veteran bonus points that might enable their recipient to gain employment and possibly launch an entire career in the New York civil service cannot be regarded as too trivial to infringe that Clause.

In light of these rulings in *Zobel*, we believe that *Zobel* has so undermined the holding of *August* that *August* should no longer be deemed to reflect the Supreme Court's view of the classification implemented by the New York scheme. Accordingly, we conclude that we are free to examine with a fresh eye the equal protection challenge to the New York provisions mounted by the present plaintiffs. *See* Part II.D.1. below.

2. *The Right to Travel*

Five Justices in *Zobel* also expressed the view that the Alaska statute violated the plaintiffs' constitutional right to travel. Justice Brennan, in a concurring opinion joined by Justices Marshall, Blackmun, and Powell, concluded that the right to travel "or, more precisely, the federal interest in free interstate migration," was clearly affected by Alaska's dividend-distribution scheme, 457 U.S. at 66, for if every state rewarded residents in proportion to the length of their residency, "the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive," *id.* at 68. These four Justices found that the right to travel, which could be ascribed to any of a number of constitutional provisions, *see* Part II.D.2. below, and "achieve[d] its most

forceful expression in the context of equal protection analysis," *id.* at 67, provided an alternative and independent rationale for holding the Alaska statute unconstitutional.

In a separate opinion concurring in the Court's judgment, Justice O'Connor concluded that the right to travel, as reflected in the Privileges and Immunities Clause of Article IV of the Constitution, and not equal protection, was the basis on which the Alaska statute should be struck down.

Although the *Zobel* Court expressly rested its invalidation of the Alaska statute on equal protection grounds, and although the five Justices who concluded that the statute violated the right to travel were not unanimous as to the constitutional basis for that conclusion, we believe the concurring opinions also reflect doctrinal development that undercuts *August* v. *Bronstein*'s holding that the New York provisions did not violate the right to travel. The only basis expressed by the *August* court for this ruling was that the bonus awarded under the New York scheme conferred so limited a benefit that it could not realistically be held to penalize the right to travel. 369 F. Supp. at 194. As we observed with respect to the *August* court's similar ruling on the equal protection challenge, the annual amounts at issue in *Zobel* were far less significant than the potential deprivations at issue here, *i.e.*, a job and the possible launching of a career.

Accordingly, we feel free also to review, without the constraints of *August*, the plaintiffs' challenge to the New York provisions as an undue burden on the right to travel.

D. *The Constitutionality of the New York Provisions*

We turn, therefore, to the merits of plaintiffs' constitutional challenges to the New York provisions, which are in some ways like, and some ways unlike, the Alaska statute struck down in *Zobel*. They are like the Alaska scheme in that, as applied, they are plainly retrospective, focusing on the veteran's New York residence at the time he entered the armed services. The veteran's ability to satisfy the New York residence requirement is thus fixed. He either was a New York resident at the time of his initial induction or he was not; he cannot earn a change in status.

On the other hand, the New York provisions are different from the Alaska scheme in that those who met the New York residence requirement at the time they entered the armed services are given the right to enjoy the bonus only once. If a veteran is awarded the bonus points, thereby has his rank improved on two civil service eligibility lists, and is thereafter appointed to a position from one of those lists, he is not permitted to use the bonus points on the second list; and he will not be granted bonus points for any other civil service eligibility list. Thereafter, the veteran who once enjoyed a bonus must compete on an equal footing with other veterans. Thus, the distinction created by the New York provisions, though fixed, is not immutable.

Notwithstanding the fact that the veteran bonus is capable of being used up, we conclude that plaintiffs' constitutional challenges have merit because the distinction drawn between those otherwise qualifying veterans who were New York residents when inducted and those who were not does not rationally further a compelling, or even a legitimate, interest of the State.

1. *The Equal Protection Clause*

The State advances four purposes in support of the challenged distinction: (a) compensating veterans for the service they have performed, (b) lessening the burden imposed by military service, (c) encouraging veterans to settle in New York and enter the State's civil service at the end of their military service, and (d) encouraging service in the armed forces. Each of these purposes can be framed neutrally, as we have stated it, focusing only on the veteran's nonresidential attributes; or it can be framed in terms of a desire to compensate or encourage only those who were New York residents at a given time in the past. Framed neutrally, without regard to the residence of the veteran to be compensated or encouraged, the purposes advanced have no rational relationship to the distinction drawn by the New York provisions. Framed strictly in terms of a desire to compensate or encourage only veterans who were New York residents at a given time in the past, the claimed purposes are not legitimate.

We note at the outset that we are not concerned here with the distinction the statutory scheme draws between veterans and nonveterans, *see Regan* v. *Taxation Without Representation*, 461 U.S. 540, 551 (1983); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979), or between wartime veterans and peacetime veterans, *see Russell* v. *Hodges*, 470 F.2d 212, or between current residents and current nonresidents. The universe on which we must focus is simply the universe of honorably discharged wartime veterans who are now residents of New York and who have passed a New York civil service examination. Our task is to determine whether, within that universe, the distinction between those who were

New York residents at the time of induction and those who were not is one that rationally furthers a legitimate state interest. Conducting our analysis within this universe, we cannot see that any legitimate purpose advanced by the State has any rational relationship to the exclusion of those veterans who were not residents of the State when they entered the armed services.

A state's purpose of recognizing that wartime veterans have performed valuable service and of compensating them for such service is a legitimate state purpose. There can be no question that a state receives a benefit from the service of individuals in the armed forces. Having no armies of their own, states depend on the national military to protect them from invasion or attack; the national armed forces defend state political and economic interests both in the United States and abroad. Receiving such benefits from military service, a state has a legitimate interest in compensating those who render it. Yet while this purpose thus supports the existence of a veteran preference in general, it is not rationally related to the distinction drawn between time-of-induction New York residents and time-of-induction nonresidents. When an individual enters the armed forces, he joins the national armed forces, not the armed forces of a particular state. The benefits that accrue to a state from an individual's military service come by virtue of the state's membership in the nation. The benefits do not depend on the residence of the provider of the services. There would be no rational basis for suggesting that a soldier from New York performs more valuable service for his country—or for New York—than does a soldier from another state.

Similarly, there is nothing in the goal of lessening the burden imposed by military service that provides a

basis for distinguishing between time-of-induction New York residents and nonresidents. There is no question that wartime military service can impose substantial burdens on an individual.

> Veterans have "been obliged to drop their own affairs to take up the burdens of the nation," *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943), "'subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.'" *Johnson* v. *Robinson*, 415 U.S. 361, 380 (1974) (emphasis deleted).

Regan v. *Taxation Without Representation*, 461 U.S. at 550-51. Given the benefits that a state receives from an individual's military service, it has a legitimate interest in attempting to lighten the burden of that service. The existence of a veteran preference, with its promise of an enhanced opportunity for the steady income, high job security, and valuable fringe benefits that usually accompany a civil service position, can serve to lighten the burdens and compensate for the dislocations that frequently accompany wartime military service. But again, while this purpose is served by granting a preference to veterans in general, there appears to be no rational relationship between this purpose and the distinction between time-of-induction New York residents and nonresidents. Entry into the military occasions as much disruption for the Californian as it does for the New Yorker; each bears the burden of defending his country; each may be as much at risk. The personal burdens resulting from military service simply are not related to the state from which an individual entered the armed forces.

Likewise, the desire of New York to encourage veterans to settle in New York and join its civil service

after concluding their military service seems entirely unrelated to the matter of their time-of-induction residence. If veterans are desirable residents, if their demonstrated patriotism, loyalty, discipline, and experience make them valuable as civil servants, there is nonetheless no basis for supposing that this desirability is linked to the fact that, prior to their military service, they lived in New York. Indeed, if a veteran had lived in New York most of his life but was a resident of another state at the time of his induction, he would not, even if he moved back to New York at the end of his military service, qualify for the veteran bonus points at issue here. Presumably both that veteran and a veteran who had never lived in New York would exhibit the same patriotism and loyalty and have gained the same experience and discipline as one who had been a New York resident at the moment of induction. The requirement of New York residence at the moment of induction thus eliminates the great majority of those whom, by hypothesis, the State considers desirable and is an entirely arbitrary basis on which to distinguish among the veterans whom New York wishes to attract to its civil service.

Finally, the goal of encouraging service in the armed forces is likewise a legitimate state interest that bears no rational relationship to a distinction based on residency. Since, as we have noted above, a state gains important benefits from service performed by individuals in the armed forces, it has a legitimate interest in encouraging individuals to perform such service. The benefits accruing to a state from the individual's service in the national armed forces, however, do not depend on the state in which the individual resided when he was inducted. Nor can the state's desire to express its own patriotism by encouraging its residents to serve the

nation in time of need justify the challenged favoritism toward its own residents, for the nation could not survive on the strength of services of individuals from a single state. Thus, while a state's patriotism is exhibited by its encouragment of its residents to do their part, patriotism also requires recognition that their part is not the whole. The State thus does not have a legitimate interest in encouraging *only* its own residents to perform military service.

Each of the State's four purposes, therefore, framed neutrally without respect to the residence of the person to be rewarded or encouraged, is without rational relationship to the distinction drawn by the New York provisions in terms of the veteran's residence at the time of induction. Viewed in this light, the provisions run afoul of the Equal Protection Clause because the distinction bears no rational relationship to the veterans' "*relevant* characteristics." *Zobel* v. *Williams*, 457 U.S. at 70 (Brennan, *J.*, concurring (emphasis in original)).

When we view the four stated purposes as designed to benefit or encourage only former New Yorkers, they fare no better, for the State's interest in favoring those who were residents at some former time over those who became residents at a later time is not legitimate. If the State's purpose is to compensate only prior New York resident veterans for their past services while leaving its newer resident veterans uncompensated, to lessen the burden of military service only on longer-term New Yorkers while leaving newer residents of New York unrelieved, to encourage New Yorkers to return to New York by placing newcomers at a disadvantage, or to encourage only New Yorkers to enter the armed services, the statutory scheme must fail in light of *Zobel* v. *Wil-*

liams's ruling that a purpose of "'favoring established residents over new residents,' is constitutionally unacceptable." 457 U.S. at 65 (quoting *Vlandis* v. *Kline*, 412 U.S. at 450).

Accordingly, we conclude that the State has shown no valid interests that are rationally served by the New York provisions challenged here. Since the only apparent justification for the distinction between veterans who were and veterans who were not New York residents at the time of their induction is the favoring of those who are longer-term residents over newer residents, we conclude that the New York provisions violate the Equal Protection Clause.

2. *The Right To Travel*

We also conclude that the distinction drawn by New York's statutory scheme violates the constitutionally protected right to travel. The textual source in the Constitution for such a right has been called "obscure," *Zobel* v. *Williams*, 457 U.S. at 60 n.6, with the basis for it being ascribed in different cases to the Privileges and Immunities Clause of the Fourteenth Amendment, *see Edwards* v. *California*, 314 U.S. 160, 178 (1941) (Douglas, *J.*, concurring); *id.* at 182-84 (Jackson, *J.*, concurring); *Twining* v. *New Jersey*, 211 U.S. 78, 97 (1908), to the Privileges and Immunities Clause of Article IV, § 2, *see Zobel* v. *Williams*, 457 U.S. at 78-81 (O'Connor, *J.*, concurring in the judgment); *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); to the Commerce Clause, *see Edwards* v. *California*; *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), or to the "essence" of the Constitution "that transformed a loose confederation of States

into one Nation," *Zobel* v. *Williams*, 457 U.S. 67 (Brennan, *J.*, concurring); *see Shapiro* v. *Thompson*, 394 U.S. at 630; *The Passenger Cases*, 48 U.S. (7 How.) at 491-92 (Taney, *C.J.*, dissenting). *See also Zobel* v. *Williams*, 457 U.S. at 60 n.6 ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis."); *id.* at 66 n.1 (Brennan, *J.*, concurring: "[W]here the 'right to travel' is involved, our cases leave no doubt that it will trigger intensified equal protection scrutiny.").

> Whatever the origin, it is now indisputable that
>
> "[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."

Shapiro v. *Thompson*, 394 U.S. at 630 (quoting *United States* v. *Guest*, 383 U.S. 745, 757 (1966)); *accord Zobel* v. *Williams*, 457 U.S. at 67 (Brennan, *J.*, concurring); *Dunn* v. *Blumstein*, 405 U.S. at 338; *see also The Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, *C.J.*, dissenting: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.").

Merely having an effect on travel is not sufficient to raise an issue of constitutional dimension. For example, a statute that encourages travel does not burden the right.

> A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addi-

> tion, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully—indeed, necessarily—consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

Zobel v. *Wiliams*, 457 U.S. at 67-68 (Brennan, *J.*, concurring). Rather, a statute implicates the constitutional right to travel when it actually deters such travel, *see Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868); *see also Shapiro* v. *Thompson*, 394 U.S. at 629, or when impedance of travel is its primary objective, *see Zobel* v. *Williams*, 457 U.S. at 62 n.9; *Shapiro* v. *Thompson*, 394 U.S. at 628-31, or when it uses " 'any classification which serves to *penalize* the exercise of that right,' " *Dunn* v. *Blumstein*, 405 U.S. at 340 (quoting *Shapiro* v. *Thompson*, 394 U.S. at 634 (emphasis added)); *accord Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 258 (1974); *Oregon* v. *Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of Brennan, White, and Marshall, *JJ.*). Where a classification is found to implicate the right to travel, it will be upheld only if it is found to "be necessary to promote a *compelling* governmental interest." *Shapiro* v. *Thompson*, 394 U.S. at 634 (emphasis in original); *accord Memorial Hospital* v. *Maricopa County*, 415 U.S. at 258, 262; *Dunn* v. *Blumstein*, 405 U.S. at 339, 341; *Oregon* v. *Mitchell*, 400 U.S. at 238 (separate opinion of Brennan, White, and Marshall, *JJ.*).

In *Zobel* v. *Williams*, the court noted that "the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." 457 U.S. at 60 n.6. In the present case, while New York's veteran preference scheme does not contain a numerically defined durational residency requirement such as those found unconstitutional in *Shapiro* v. *Thompson*, *Dunn* v. *Blumstein*, and *Memorial Hospital* v. *Maricopa County*, it plainly creates "distinctions between newcomers and longer term residents." *Zobel* v. *Williams*, 457 U.S. at 60 n.6. Veterans who choose to migrate to New York after they have entered the armed services are treated differently from those who migrated to the State before their induction or who are lifelong residents of the State.

Nor is it difficult to realize that the difference in treatment constitutes a penalty, for veterans who were not residents of New York at the time of their induction are told that if they wish to enter the civil service in New York, they may compete only at a disadvantage vis-a-vis veterans who were residents at that prior time. While the disadvantage may, over time, be lessened by the fact that veteran bonus points may be used only once, the fact remains that the veteran denied a preference by New York's scheme is disadvantaged each time a competitor uses a bonus; and the veteran denied the preference can never become entitled to bonus points, no matter how long he remains a New York resident. We are compelled to conclude, therefore, that veterans who did not enter the armed forces from New York are in effect penalized for traveling to New York.

Moreover, the fundamental detriment of the New York provisions is plain when we view the right to travel as a federal interest in free interstate migration. As the court in *August* v. *Bronstein* pointed out, other states accord benefits to their own resident veterans while denying them to others. 369 F. Supp. at 193. *See, e.g.*, Del. Code Ann. tit. 29, § 5935 (1983) (requiring time-of-induction residence for entitlement to veteran preference for civil service employment); R.I. Gen. Laws §§ 36-3-3(10), 36-4-19 (1984) (requiring 6-month preinduction residence for entitlement to veteran preference for civil service employment). And we must recognize that, as intimated by the four concurring Justices in *Zobel*, if each state were free to grant benefits only to time-of-induction resident veterans while denying them to other veterans, the effect would be to discourage any veteran from moving from his home state, thereby lessening "the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order." 457 U.S. at 68 (Brennan, *J.*, concurring). Therefore, we hold that New York's veteran preference scheme burdens the right to travel and may be upheld only if necessary to promote a compelling state interest.

In light of our discussion in Part II.D.1. above, it is readily apparent that the New York scheme fails to satisfy the compelling-state-interest test. We have shown that to the extent that any of the purposes claimed by the State is legitimate, it is not rationally related to the distinction drawn between time-of-induction New York residents and non-residents. It follows *a fortiori* that even if any of these purposes, when framed so as to be legitimate, could be considered "compelling," the distinction drawn by the statute, which is not rationally related to the purpose, could hardly be deemed "necessary" to its achievement.

We hold, therefore, that the New York scheme impermissibly infringes the right to travel and, for this reason as well, must be declared unconstitutional.

E. *Severability*

Having found that the classification created by the New York veteran preference scheme violates the Equal Protection Clause and the right to travel, we are faced with the question of the proper remedies for those violations. As the Supreme Court stated in *Califano* v. *Westcott*, 443 U.S. 76, 89 (1979) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, *J.*, concurring in the judgment)),

> "[w]here a statute is defective because of underinclusion," . . . "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."

Though the Court has stated that generally "extension, rather than nullification, is the proper course," *Califano* v. *Westcott*, 443 U.S. at 89; *see Jimenez* v. *Weinberger*, 417 U.S. 628, 637-38 (1974), the question is ultimately one of legislative intent to be decided on the basis of "whether it more nearly accords with [the legislature's] wishes to eliminate the policy altogether or extend it to render what [the legislature] plainly did intend, constitutional," *Welsh* v. *United States*, 398 U.S. at 355-56 (Harlan, *J.*, concurring in the judgment).

In the present case we have little difficulty in concluding that the New York legislature would prefer having the veteran preference extended to otherwise qualifying veterans who were not New York residents at the time of their induction into the armed forces to having it struck down in its entirety. As noted in *Andrade* v. *Nadel*, 477 F. Supp. 1275 (S.D.N.Y. 1979), which struck down a provision of the veteran preference scheme that precluded legally resident aliens from receiving the preference points,

> [t]here can be no doubt about the strength and depth of New York's commitment to a veterans' preference policy This is demonstrated by more than a century of granting such preferences and by the fact that this provision has been frozen into the State Constitution itself. A determination that the entire veterans' preference policy is void would be unreasonable, and might have sudden and highly adverse effects on the New York Civil Service System . . . .

Id. at 1279. We agree and hold that the proper remedy here is to require the State and its agents to extend the veteran preference to otherwise qualifying veterans who were not residents of New York at the time they entered the armed forces.

F. *Proceedings on Remand*

Plaintiffs' complaint requests a variety of relief, some of general application and some seeking vindication only of their individual rights. In the former category are the requests that the court enter a judgment declaring article V, § 6, of the New York Constitution and § 85(1)(a) of the New York Civil Service Law unconstitutional insofar as they deny bonus points to otherwise qualifying veterans who were not residents of New York at the time they entered the armed forces, and that the court permanently enjoin defendants from denying such veterans the bonus points. In light of our opinion today, the district court should enter a judgment granting such declaratory and injunctive relief.

Plaintiffs' entitlement to individual relief, however, should be the subject of further proceedings. As noted in Part II.A. above, defendants did not call into question plaintiffs' claims that they satisfied all of the unchallenged requirements of § 85. There was perhaps occasion for defendants to take issue with those claims (if there was any basis for contesting them) since plaintiffs, in support of their motion for summary judgment, submitted a statement pursuant to Rule 3(g) of the Local Rules of the Southern District of New York, setting forth a number of facts that they contended showed they had met the unchallenged requirements of the New York provisions. Defendants did not submit a responsive Rule 3(g) statement that controverted any of these factual averrals, but instead cross-moved for summary judgment, submitting their own Rule 3(g) statement and implicitly taking the position that the factual averrals made by plaintiffs were not material in light of *August* v. *Bronstein*.

Local Rule 3(g) provides, in pertinent part, that "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." While normally Rule 3(g) might be applied to deem defendants to have admitted that plaintiffs have met all of the requirements of the provisions in question except New York residence

at the time of induction, we do not think it appropriate in the present case to conclude that defendants have made such a concession. Given defendants' reliance on the presumptively dispositive ruling in *August* for the proposition that plaintiffs could not obtain relief even if their assertions were true, and the fact that this is not simply a dispute between two private parties, we believe defendants should not be held to have conceded the facts asserted in plaintiffs' Rule 3(g) statement. If defendants believe there is any genuine issue as to whether either plaintiff met the other criteria for the award of the bonus points claimed, defendants should be allowed to assert that position. If, in response, either plaintiff cannot show his eligibility for the individual relief he requests, he should not receive it, since granting him such relief would adversely affect other candidates who, by hypothesis, would be more deserving.

Accordingly, as to the individual relief requested in the complaint, we remand to the district court for further proceedings to determine whether plaintiffs in fact met all of the other requirements of the New York provisions for the award of the claimed bonus points. If either plaintiff did meet those requirements, the court should require defendants to adjust accordingly his score and position on any eligibility list so long as that plaintiff has not received an appointment, either original or promotional, from an eligibility list reflecting the bonus points.

We also leave for consideration on remand such other questions as remain undetermined, including whether either plaintiff should receive immediate appointment, if so to what position, and whether awards of backpay or

retroactive seniority are appropriate, as well as issues relating to defendants' defenses of immunity.

Conclusion

The judgment of the district court is reversed and the case remanded for (1) entry of judgment (a) declaring that the denial of preference points to otherwise qualifying veterans solely on the ground that they were not New York residents at the time of their induction into the United States armed forces violates the Equal Protection Clause of the Fourteenth Amendment, and the constitutionally protected right to travel, and (b) permanently enjoining defendants from denying preference points to such veterans, and (2) for further proceedings to determine any issues relating to individual relief.

Oakes, *Circuit Judge* (concurring):

I cannot, I fear, agree with the equal protection analysis of Judge Kearse's otherwise flawless opinion. It seems to me that within the traditional parameters of rational-relationship analysis, the distinction drawn by the veteran preference statute is not irrational. It is very difficult to say, *e.g.*, that "[t]he personal burdens resulting from military service simply are not related to the state from which an individual entered the armed forces", opinion at 2041, because those burdens may vary from state to state. Justice O'Connor's concurring opinion in *Zobel* v. *Williams*, 457 U.S. 55, 71 (1982), points to the similar difficulties in that case, *id.* at 72-73. Since I am completely content with the right-to-travel, "federal interest in free interstate migration" analysis of Justice

Brennan's *Zobel* opinion, which speaks also for Justices Marshall, Blackmun and Powell, 457 U.S. at 65-71, and which speaks approvingly of Justice O'Connor's Privileges and Immunities Clause analysis, 457 U.S. at 78-81, I would rest on that ground, "right-to-travel," which requires closer scrutiny of the New York veteran preference statute than traditional rational basis analysis would seemingly require. I thus concur.

SOTO-LOPEZ v. N.Y.C. CIVIL SERVICE COMM.

83 Civ. 1370(RO)

Endorsed Memorandum

OWEN, District Judge

While plaintiffs argue that *August v. Bronstein*, 369 F.Supp. 190 (S.D.N.Y. 1974) (three-judge court) no longer has viability in view of concepts expressed in *Zobel v. Williams*, 457 U.S. 55 (1982), I am unable to agree. It appears to me, as it did to the *August* panel, that it is neither an infringement on the rights of a resident of another state to travel, nor of equal protection of the laws for New York to promise to its own sons and daughters departing for wartime service in the armed forces that upon their honorable return, they are entitled to a modest civil service hiring advantage.

The motion for summary judgment dismissing the complaint is therefore granted.

So ordered.

R. Owen

United States District Judge

Dated: March 8, 1984
New York, New York

83 CIVIL 1370 RO

FINAL JUDGMENT

United States District Court
Southern District of New York

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

– against –

NEW YORK CITY CIVIL SERVICE COMMISSION, ET AL

The City Defendant(s) having moved for summary judgment and the said motion(s) having come before the Honorable Richard Owen, United States District Judge, and the Court thereafter on March 12, 1984, having handed down its memorandum endorsement, granting the said motion(s), it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

DATED: NEW YORK, N.Y.
March 14, 1984

Raymond R. Burghardt
Clerk

84-7325

United States Court of Appeals
for the
Second Circuit

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs-Appellants,

– against –

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel,

Defendants-Appellees,

THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Defendant-Intervenor-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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United States Court of Appeals
for the
Second Circuit

No. 84-7325

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs-Appellants,

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel,

Defendants-Appellees,

THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Defendant-Intervenor-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

The Attorney General of the State of New York as intervenor *pro se* hereby gives notice pursuant to Rule 10 of the Rules of the Supreme Court of the United States that he is appealing under 28 U.S.C. § 1254(2)(1982) the judgment of this Court entered

on February 15, 1985.

Dated: New York, New York
May 10, 1985

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Of Counsel

MOTION

No. 84-1803

Supreme Court, U.S.
FILED
JUN 6 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel, and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellants,

—vs.—

EDUARDO SOTO-LOPEZ and
ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
MOTION TO DISMISS OR AFFIRM	1
ARGUMENT—THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT	2
I. THE DECISION OF THE COURT OF APPEALS IS DIRECTLY SUPPORTED BY *ZOBEL* v. *WILLIAMS*, 457 U.S. 55 (1982), IN WHICH THIS COURT HELD THAT REWARDING CITIZENS FOR PAST CONTRIBUTIONS IS NOT A LEGITIMATE STATE PURPOSE	2
A. The Decision In *August* v. *Bronstein* Is Subject To Reconsideration In Light Of *Zobel* v. *Williams*	2
B. *Zobel* v. *Williams* Has Overruled *August* v. *Bronstein*	3
II. THE DECISION IN THIS CASE WILL NOT HAVE A SIGNIFICANT IMPACT ON NEW YORK OR OTHER STATES OR ON CIVIL SERVICE APPLICANTS OR EMPLOYEES IN THOSE STATES	10
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: PAGE

Andrade v. *Nadel*, 477 F.Supp. 1275 (S.D.N.Y. 1979) .. 6, 8

August v. *Bronstein*, 417 U.S. 901 (1974) .....*passim*

August v. *Bronstein*, 369 F.Supp. 190 (S.D.N.Y.) (three judge court) .....*passim*

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 2

Dumbrowski v. *Pfister*, 380 U.S. 479 (1965) 2

Dunn v. *Blumstein*, 405 U.S. 330 (1972)..... 4, 9

Edelman v. *Jordan*, 415 U.S. 651 (1974) 2

Hicks v. *Miranda*, 422 U.S. 332 (1975)..... 3

Mandel v. *Bradley*, 432 U.S. 173 (1977) 3

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979)..... 5, 7

Richardson v. *Ramirez*, 418 U.S. 24 (1974) 2

Russell v. *Hodges*, 470 F.2d 212 (2d Cir. 1972) 3

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 4, 9

United States v. *Guest*, 383 U.S. 745 (1966) 9

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 2

Zobel v. *Williams*, 457 U.S. 55 (1982) .....*passim*

Constitutional Provisions:

U.S. Const. amend. XIV, § 1.....*passim*

N.Y. Const. art. V, § 6 (McKinney 1969) .....*passim*

PAGE

Statutes:

Ala. Code § 31-6-11 (1983) 10

Del. Code Ann. tit. 29, § 5935 (Michie 1975) 10

Ind. Code Ann. § 10-5-24-1 (Burns Supp. 1984) 10

Ky. Rev. Stat. Ann. § 40.010 (Michie 1980)..... 10

La. Rev. Stat. Ann. § 29.293 (West 1975) 10

Me. Rev. Stat. Ann. tit. 37-B § 505 (West Supp. 1984) 10

Mich. Comp. Laws Ann. § 35.1001 (West Supp. 1984) 10

Mich. Comp. Laws Ann. § 35.1022 (West Supp. 1984) 10

Miss. Code Ann. § 35-7-5 (Law. Co-op. 1972) 10

N.Y. Civ. Serv. Law § 85(1)(a) (McKinney 1983) .....*passim*

Or. Rev. Stat. § 408.010 (1983)..... 10

Or. Rev. Stat. § 408.230 (1983)..... 10

R.I. Gen. Laws § 36-3-3 (2) (Michie 1984)..... 10

R.I. Gen. Laws § 36-4-19 (Michie 1984)..... 10

Wis. Stat. Ann. § 45.28 (West 1979) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1803

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, Individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, Individually and as Director of the New York City Department of Personnel, and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellants,

—vs.—

EDUARDO SOTO-LOPEZ and
ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees Soto-Lopez and Baez-Hernandez ("plaintiffs") move this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Court of Appeals for the Second Circuit on the ground that the questions raised are so insubstantial that there is no need for further argument and consideration.[1]

---

1 Plaintiffs do not disagree with appellant's (Attorney General of the State of New York, hereafter "Attorney General") statement of questions presented, listing of relevant opinions below, applicable constitutional and statutory provisions and statement of the case. Accordingly, plaintiffs do not repeat them here. See Rule 34.2 of the Rules of the Supreme Court of the United States.

ARGUMENT

THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL QUESTIONS NOT PREVIOUSLY DECIDED BY THIS COURT.

The decision of the Second Circuit holding that the residency at time of induction requirements of Article V, Section 6 of the New York State Constitution and Section 85(1)(a) of the New York State Civil Service Law violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the constitutionally protected right to travel is amply supported by recent decisions of this Court. This decision will not burden New York or other states with similar provisions and will not unfairly impact on applicants for, or employees in, civil service positions.

I. THE DECISION OF THE COURT OF APPEALS IS DIRECTLY SUPPORTED BY *ZOBEL* v. *WILLIAMS*, 457 U.S. 55 (1982), IN WHICH THIS COURT HELD THAT REWARDING CITIZENS FOR PAST CONTRIBUTIONS IS NOT A LEGITIMATE STATE PURPOSE.

A. The Decision In *August* v. *Bronstein* Is Subject To Reconsideration In Light Of *Zobel* v. *Williams*.

The Attorney General relies almost exclusively on this Court's decision in *August* v. *Bronstein*, 417 U.S. 901 (1974). However, because *August* involved a summary affirmance of a lower court decision [*August* v. *Bronstein*, 369 F.Supp. 190 (S.D.N.Y. 1974) (three judge court)], it does not have the same precedential value in this Court as a written opinion issued after full consideration. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Richardson* v. *Ramirez*, 418 U.S. 24, 83 n.27 (1974) (Marshall, J. dissenting). Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).[2] This is so, in part, because a

2 The Attorney General's citation to *Dumbrowski* v. *Pfister*, 380 U.S. 479, 483 (1965), is inapposite. That case involved an apparent conflict between the decision on appeal and a later decision of this Court, *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), which involved a full written opinion after plenary consideration.

summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, 457 U.S. 55, 64 n.13 (1982).

More importantly, *August* has been clearly, albiet implicitly, overruled by this Court's subsequent decision in *Zobel* v. *Williams*. It is not disputed that the district court in *August* placed primary reliance on New York's right to compensate certain of its residents for past contributions. It described the veterans' preference as "a token of gratitude. . . [for] service in time of war. . ." *August* v. *Bronstein*, 369 F.Supp. at 193. It also cited *Russell* v. *Hodges*, 470 F.2d 212, 218 (2d Cir. 1972), to the same effect. In *Zobel*, however, this Court ruled unequivocally that "reward[ing] citizens for past contributions . . . [is an] objective that is not a legitimate state purpose." *Zobel* v. *Williams*, 457 U.S. at 63. Thus, the doctrinal underpinning of the three judge court is no longer valid.

The Court of Appeals, however, did not simply ignore or disregard the decision in *August*. It exhibited great deference by subjecting it to a detailed and exacting analysis. This was after the Court of Appeals properly recognized that a summary affirmance by this Court may no longer be binding precedent if it "has been overruled, [either] explicitly or implicitly, by a subsequent Supreme Court decision. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977); *Hicks* v. *Miranda*, 422 U.S. at 344-45; . . ." (A-13). The Attorney General does not disagree with this principle. (Jurisdictional Statement, p. 9). A closer examination of *Zobel* v. *Williams* demonstrates, as the Court of Appeals concluded, that it contains doctrinal developments which undercut *August* v. *Bronstein* as a binding precedent.

B. *Zobel* v. *Williams* Has Overruled *August* v. *Bronstein*.

The Attorney General suggests that the *Zobel* decision has no relevance to this case because it was based on principles applicable to durational residency requirements, the past contributions Alaska sought to reward were undefined and because the Alaska dividend distribution plan operated retrospectively. These distinctions are either inaccurate or do not affect the applicability of *Zobel* to this case.

A durational residency requirement typically comprehends the imposition of a fixed waiting period between the time of a person's arrival in the state as a resident and the time he is entitled to a particular benefit granted by the state. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Zobel* v. *Williams*, 457 U.S. at 58. The Alaska dividend distribution plan involved no such waiting period. Newly arrived residents were entitled to participate, albiet to a lesser extent, during the first year of the plan's operation. *Zobel* v. *Williams*, 457 U.S. at 58-59. Similarly, New York's veterans' preference scheme imposes no waiting period as a condition of receiving the benefit. Indeed, in the context of the challenged residency requirement, entitlement to the veterans' preference is governed by an event which may have occurred in the distant past.

A rationale typically advanced in support of durational residency requirements has been the need or desire to establish a newly arrived resident's bona fides. However, no such rationale was advanced in *Zobel* (*Zobel* v. *Williams*, 457 U.S. at 59) and none has been advanced here.

Thus, Chief Justice Berger concluded in *Zobel* that "[t]he Alaska dividend distribution law is quite unlike the durational residency requirements we examined [previously] . . ." *Id.* at 58.

The right to receive dividends under the Alaska plan was admittedly keyed to length of residence. For all practical purposes New York's veterans' preference provisions also operate on the basis of length of residence. They are applied at a point in time when they distinguish between equally bona fide residents whose only difference is their length of residence. This is so since those who enter the service from New York will normally have resided in the state longer at the time the veterans' preference is applied than those who became New York residents after the completion of their service.[3]

3 The similarity of the two cases is apparent from one of a series of rhetorical questions posed by the Court in *Zobel*: "If states can make the amount of a cash dividend depend on length of residence, what would preclude . . . limiting access . . . for civil service jobs . . . by length of domicile?" *Zobel* v. *Williams*, 457 U.S. at 64.

The Court of Appeals correctly read *Zobel* as establishing an additional doctrinal development to the effect that "it is not a legitimate state purpose to confer benefits based solely on past residency at a particular time." (A-17). The New York constitutional and statutory provisions clearly link the conferral of the veterans' preference to residency at a particular time in the past, namely, time of induction. Because of this the holding in *August* v. *Bronstein* is significantly undercut by *Zobel*.

In sum, the use of residency in the Alaska dividend distribution plan is essentially identical to New York's use of residency in its veterans' preference scheme. Because the former was declared unconstitutional in *Zobel*, it follows that the latter is also impermissible. Indeed, New York's use of residency is even more offensive than either its use in typical durational residency statutes or in *Zobel*. In the classical durational residency situation the newly arrived resident will receive the particular benefit after satisfying the waiting period. In *Zobel* new residents were able to participate immediately in the dividend program although the amount of dividends to which they were entitled was less than that of longer term residents. Here New York State veterans who served in time of war and were honorably discharged but who did not enter the service from New York are forever foreclosed from receiving a veterans' preference in connection with civil service employment.[4]

The Attorney General also attempts to distinguish *Zobel* on the basis that the provisions under attack here vest contem-

4 In *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 263 n.9 (1979), decided subsequent to *August*, this Court cited with apparent approval a lower court's invalidation, on equal protection grounds, of Massachusetts' five year durational residency requirement applied to veterans' preference credits. In light of the discussion above, it is difficult to see how a durational residency requirement can be considered impermissible but a non-durational residency requirement not infirm when the latter is so much more restrictive.

poraneously with entry into the armed forces and therefore operate only prospectively. (Jurisdictional Statement, pp. 12, 14). This is entirely incorrect. At a minimum they require that the veteran be honorably discharged, an event which occurs only upon separation from the service. Moreover, prior to its ammendment resulting from the decision in *Andrade* v. *Nadel*, 477 F.Supp. 1275 (S.D.N.Y. 1979), Civil Service Law, Section 85(1)(a) (McKinney's 1983) also required residency in New York at the time of application for appointment to the civil service. Finally, the statute in its present form still requires a passing grade on the civil service examination before a veteran may seek to have an additional credit applied to his score. Civil Service Law, Section 85 (2)(b).

The final distinction which the Attorney General raises is that *Zobel* involved undefined past contributions while the New York provisions are based on precisely defined past contributions. (Jurisdictional Statement, p. 12). Although this is true, it is a distinction which only serves to highlight the inequity of the New York plan. The evil of undefined past contributions is that there is no standardized measure for awarding benefits. Here the fact that the past contribution is specifically defined as military service demonstrates unequivocally the unfairness and inequity of the distinction New York has made among its resident veterans for purposes of awarding veterans' credits.

The Court of Appeals identified four purposes advanced by New York in support of the veterans' preference: "(a) compensating veterans for the service they have performed, (b) lessening the burden imposed by military service, (c) encouraging veterans to settle in New York and enter the States' civil service at the end of their military service, and (d) encouraging service in the armed forces." (A-21). It then went on to demonstrate in detail that whether viewed neutrally without reference to a veteran's residence at time of induction, or analyzed only in terms of benefitting New York time of induction residents, the classifications drawn by the challenged provisions are impermissible.

This is so because the past contribution sought to be compensated—military service in time of war—is not a function of or in any way related to residence at time of entrance into the service. Those who perform military service do so for the entire nation, not the state from which they entered the service. The hardships imposed by military service arise because that service is performed, not because of the veteran's residence at time of induction. The value of having veterans as residents and workers in the state's civil service is a function of their military training, not the state in which they lived prior to their military service. Finally, the objective of encouraging service in the military, although clearly legitimate, is in no way promoted by limiting the veterans' preference to time of induction residents. Service in the military is service in the national armed forces which benefits all states equally. The contributions of individual veterans, and the burdens they have been forced to shoulder, are presumptively the same. They are certainly unrelated to the veteran's residence at time of induction or enlistment.

The foregoing demonstrates most clearly the insubstantiality of the present appeal. The Attorney General has not even made a pretense of arguing that the distinction New York has made between its otherwise equally circumstanced present resident veterans is in any way rationally related to the accomplishment of the stated objectives of the veterans' preference provisions. Indeed, the Attorney General's silence only confirms plaintiffs' arguments below and the correctness of the Court of Appeals decision.

The Attorney General notes very briefly that the objectives of the veterans' preference provisions serve a legitimate state purpose. (Jurisdictional Statement, p. 13). But that is not, has not and could not be the issue. *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979). The question is whether, accepting the stated objectives, the distinction under challenge passes constitutional muster. By failing to address this aspect of the Court of Appeals decision the Attorney General has

conceded its correctness and acknowledged that there is no real basis to his appeal.[5]

Under these circumstances it is unnecessary to consider the Court of Appeals' treatment of plaintiffs' right to travel claim. Nevertheless, because it has been addressed by the Attorney General, it will be dealt with briefly.[6]

The Attorney General argues that *Zobel* does not undercut the right to travel aspect of *August* because *August* relied both on the limited nature of the benefit and because New York's plan does not involve a durational residency requirement. But even recognizing this dual basis to *August* does not change the applicability of *Zobel*.

It simply cannot be gainsaid that if a difference of $50 a year between newer and older residents is enough to implicate the right to travel, the difference between obtaining and not obtaining decent employment with substantial security and other benefits is likewise sufficient to bring into play the right to travel. Moreover, the detailed discussion of the value, in terms of eligibility list standing, of veterans' credits in *Andrade* v. *Nadel*, 477 F.Supp. 1275, 1279 (S.D.N.Y. 1979), a case

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5 The Attorney General's failure to address the substantive equal protection, or for that matter right to travel, issue is an even more telling indication of the lack of substantiality to this appeal when it is considered that he has stated, as one of the questions presented for this Court's determination, the issue of whether the challenged provisions "deny veterans the equal protection of the law and violate their right to travel?" (Jurisdictional Statement, p. i).

6 The Attorney General is wrong when he suggests that only the concurring opinions in *Zobel* found a right to travel violation. The opinion of the Court acknowledged the right to travel claim but, because of what it viewed as the "obscure" textual basis for such a claim, it considered right to travel subsumed under the Equal Protection Clause. *Zobel* v. *Williams*, 457 U.S. at 60 n.6. Implicit under this analysis is the conclusion that if Alaska's dividend distribution plan violated the Equal Protection Clause, as the Court held, it also violated the constitutional right to travel. Thus, Justice O'Connor's observation that the Court simply did not "rely explicitly on a right to travel" is entirely accurate. *Id*. at 72.

which the Attorney General did not litigate beyond the district court level, dispels any suggestion that they are *de minimus* in nature.

The fact that the challenged provisions do not impose a durational residency requirement is also no impediment to finding an infringement of the right to travel. As noted above, *Zobel* is not a typical durational residency case. More to the point, this court has never held that the right to travel arises only in cases involving durational residency requirements. Indeed, the right to travel may arise wholly apart from any aspect of residency. *United States* v. *Guest*, 383 U.S. 745, 757-759 (1966). The right to travel is implicated, *inter alia*, when a statute creates classifications which serve to penalize the exercise of that right. *Dunn* v. *Blumstein*, 405 U.S. 330, 340 (1972). That is precisely the situation that obtains under the challenged provisions.

Having established that the Court of Appeals was free to rule on plaintiffs' right to travel claim, it needs only to be noted briefly that there is apparently no dispute that the veterans' preference provisions in fact violate plaintiffs' right to travel. To an even greater degree than with the equal protection claim, the Attorney General has completely ignored the substantive argument.

New York's provisions penalize non time of induction veteran residents who later travel to New York in at least two ways. First, they are placed at a disadvantage with other veterans in competing for civil service positions. (A-29). Second, if they were residents of states in which they qualified for a veterans' preference, they are forced to forfeit that benefit in order to travel to New York. Under prevailing right to travel analysis these distinctions can only be justified on the basis of a compelling state interest. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). Inasmuch as the Attorney General has failed to demonstrate a rational basis for the distinction between older and newer veteran residents, it follows *a fortiori* that the classification created by the challenged provisions cannot be justified on the basis of a compelling government interest.

All of the foregoing demonstrates that *Zobel* v. *Williams* has undercut the doctrinal foundations of this Court's summary affirmance in *August* v. *Bronstein*. On the merits it is beyond dispute that New York's classification of older and newer veteran residents violates both the Equal Protection Clause and the right to travel. For both of these reasons this appeal should be dismissed or the judgment of the Court of Appeals summarily affirmed.

II. THE DECISION IN THIS CASE WILL NOT HAVE A SIGNIFICANT IMPACT ON NEW YORK OR OTHER STATES OR ON CIVIL SERVICE APPLICANTS OR EMPLOYEES IN THOSE STATES.

The claim that the decision in this case will affect "the validity of veteran preference statutes in at least 15 other states" (Jurisdictional Statement, p. 16) is disingenuous. Of the 15 jurisdictions listed in the Attorney General's footnote, *only 3* concern preferences for veterans in state or local civil service employment.[7] The other 12 states give no preference to veterans in terms of civil service employment.[8] It appears that of the remaining 35 jurisdictions that grant veterans' preferences for civil service employment none impose a residence at time of induction requirement. Thus, civil service applicants and employees in the great majority of states are in no way affected by the decision in this case.

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7 Delaware, Del. Code Ann. tit. 29, § 5935 (Michie 1975); Oregon, Or. Rev. Stat. §§ 408.010, 408.230 (1983); Rhode Island, R.I. Gen. Laws §§ 36-3-3(12), 36-4-19 (Michie 1984).

8 For example, Alabama, Ala. Code § 31-6-11 (1983); Wisconsin, Wis. Stat. Ann. § 45.28 (West 1979); and Maine, Me. Rev. Stat. Ann. tit. 37-B § 505 (West Supp. 1984) give special educational benefits to veterans. Other states such as Kentucky, Ky. Rev. Stat. Ann. § 40.010 (Michie 1980); Louisiana, La. Rev. Stat. Ann. § 29.293 (West 1975); and Michigan, Mich. Comp. Laws Ann. §§ 35.1001, 35.1022 (West Supp. 1984) merely give limited cash bonuses to qualifying veterans. Indiana, Ind. Code Ann. § 10-5-24-1 (Burns Supp. 1984), has a physician reporting requirement relating to veterans who were subjected to chemical defoliants including agent orange while Mississippi, Miss. Code Ann. § 35-7-5 (Law. Co-op. 1972), grants loans to veterans for the purchase of a farm or home.

Moreover, the argument that in New York State alone substantial numbers of state and local employees will be adversely affected is not the case. The citation to certain generalized workforce statistics is unenlightening. More importantly though, since New York already grants a preference to time of induction residents, the state has already assumed the responsibility of processing such applications and non veteran civil service applicants and employees are already affected by the grant of veterans' preferences. The elimination of the residency at time of induction requirement will only affect New York and its workers in a very incremental way at best.

All of this is apparently not seriously disputed. The New York City Department of Personnel, one of the defendants below, announced shortly after the Second Circuit opinion that it would comply with that decision. It has not filed a notice of appeal and has in fact revised its policies. In addition, on April 26, 1985 the New York State Department of Civil Service, the state agency charged with carrying out the provisions of Section 85(1)(a) of the Civil Service Law, promulgated written instructions for complying with the decision of the Court of Appeals. In a letter dated May 16, 1985 the Attorney General has advised that he will not interfere with this by seeking a stay.

Under all of these circumstances it is clear that the decision appealed from will not have any significant impact on New York or other states or on civil service applicants or employees in those states.

CONCLUSION

This appeal does not raise any substantial issues. The Court of Appeals decision holding that New York State's veterans' preference provisions violate the Equal Protection Clause of the Fourteenth Amendment and the constitutionally protected right to travel is obviously correct. This Court's summary affirmance in *August* v. *Bronstein*, 417 U.S. 901 (1974), has been implicitly overruled by the Court's latter decision in *Zobel* v. *Williams*, 457 U.S. 55 (1982). An affirmance here will

have no significant impact on civil service applicants and employees in New York or the three other states that have veterans' preference credits based on residence at time of induction.

For all of the foregoing reasons, this Court should dismiss this appeal or, in the alternative, affirm without plenary consideration the judgment of the Court of Appeals for the Second Circuit.

Dated: New York, New York
June 4, 1985

Respectfully submitted,

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APPELLANT'S

BRIEF

No. 84-1803

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Appellant,

vs.

EDUARDO SOTO-LOPEZ and
ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT

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Questions Presented

1. Did this Court overrule *August v. Bronstein*, 417 U.S. 901 (1974), which held this challenged law constitutional, when it decided *Zobel v. Williams*, 457 U.S. 55 (1982), and *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985)?

2. Do art. V, § 6 of the New York State Constitution and § 85 (1)(a) of the New York State Civil Service Law, which provide that all persons who enter the armed forces while New York state residents become eligible to receive additional points on their score on competitive civil service examinations if they subsequently pass them, deny veterans equal protection of the law and violate their right to travel?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
PERTINENT OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
I. THE FACTS OF THIS CASE	5
II. A BRIEF HISTORY OF NEW YORK VETERAN BONUS AND CIVIL SERVICE PREFERENCE PROVISIONS	5
III. FEDERAL COURT LITIGATION REGARDING ART. V, § 6 AND § 85	10
A. *Gianatasio v. Kaplan*	10
B. *August v. Bronstein*	11
C. *Soto-Lopez v. New York City Civil Service Commission*	11
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. THE DECISIONS OF THIS COURT IN *ZOBEL* AND *HOOPER* DO NOT VITIATE THE PRECEDENTIAL EFFECT OF *AUGUST*	17

Page

II. ARTICLE V, § 6 AND § 85 ARE CONSISTENT WITH THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT 20

A. The Plaintiffs' Equal Protection Claim Turns on Whether There Is a Rational Basis for the Initial Residency Rule 21

B. Article V, § 6 Furthers Legitimate State Purposes 23

1. The Law Operates to Encourage New York Residents to Serve in Time of War 23

2. The New York Law Provides Partial Compensation to Residents for Service in Time of War 28

3. The New York Law Encourages People to Settle in New York and to Enter the Civil Service at the End of Their Wartime Service in the Military 29

III. ARTICLE V, § 6 DOES NOT VIOLATE PLAINTIFFS' RIGHT TO TRAVEL 30

A. Article V, § 6 does not Implicate Plaintiffs' Right to Travel 31

B. The Modest Benefits Accorded New York Residents at the Time of Their Induction into the Armed Services Do Not Unreasonably Burden the Right to Travel 32

CONCLUSION 36

STATUTORY APPENDIX

SELECTED NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS AWARDING VETERAN PREFERENCES

Page

Act of May 12, 1921, ch. 702, 1921 N.Y. Laws 2483 ..... S-1

N.Y. Const. art. V, § 6 (1929) (effective Jan. 1, 1930) (amended 1945) S-3

N.Y. Const. art. V, § 6 (1945) (effective Jan. 1, 1946) (amended 1949) S-4

N.Y. Const. art. V, § 6 (1949) (effective Jan. 1, 1950) (amended 1964) S-5

N.Y. Const. art. V, § 6 (1964) (effective Jan. 1, 1965) S-7

N.Y. Civ. Serv. Law § 85(1) (McKinney 1983 & Supp. 1984-85) S-8

TABLE OF AUTHORITIES

	Page
Cases:	
Andrade v. Nadel, 477 F.Supp. 1275 (S.D.N.Y. 1979)	17
Arizona v. Rumsey, 104 S. Ct. 2305 (1984)	19
August v. Bronstein, 369 F.Supp. 190 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 419 U.S. 901 (1974)	*passim*
Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978)	25
City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)	19
Dunn v. Blumstein, 405 U.S. 330 (1972)	22, 25
Gianatasio v. Kaplan, 142 Misc. 2d 611 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 257 N.Y. 531, 178 N.E. 782 (1931), *appeal dismissed for want of a substantial federal question*, 284 U.S. 595 (1932)	10-11
Hicks v. Miranda, 422 U.S. 332 (1975)	18
Hooper v. Bernalillo County Assessor, 101 N.M. 172, 679 P.2d 840, *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984), *rev'd*, 105 S. Ct. 2862 (1985)	*passim*
Jones v. Helms, 452 U.S. 412 (1981)	15, 22, 31
McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976)	16, 18, 25, 26

	Page
Mandel v. Bradley, 432 U.S. 173 (1977)	18, 19
Martinez v. Bynum, 103 S. Ct. 1842 (1983)	25, 26-27, 32
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	15, 22, 25, 33
Moragne v. States Marine Lines, Inc. 398 U.S. 375 (1970)	19
New Orleans v. Dukes, 427 U.S. 297 (1976)	23
Ohio ex rel. Easton v. Price, 360 U.S. 246 (1959)	18
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)	15, 21, 22, 26
Plyler v. Doe, 457 U.S. 227 (1982)	26
Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972)	17
Schweiker v. Wilson, 450 U.S. 221 (1981)	21
Shapiro v. Thompson, 394 U.S. 618 (1969)	22, 25
Solem v. Helm, 463 U.S. 277 (1983)	19
Sosna v. Iowa, 419 U.S. 393 (1975)	22
Soto-Lopez v. New York City Civil Service Commission, 753 F.2d 266 (2d Cir. 1985), *prob. juris. noted sub nom. Attorney General of State of New York v. Soto- Lopez*, 105 S. Ct. 3523 (1985)	*passim*
Spatt v. New York, 414 U.S. 1058 (1973)	17
Starns v. Malkerson, 401 U.S. 985 (1970)	26
Sturgis v. Washington, 414 U.S. 1057 (1973)	17, 26

	Page
Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1985)	22
Tucker v. Salera, 424 U.S. 959 (1976), *aff'g mem.*, 399 F. Supp. 1258 (E.D. Pa. 1975) (three- judge court)	18, 19
Tully v. Griffin, Inc., 429 U.S. 68 (1976)	18
United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 104 S. Ct. 1020 (1984)	16, 22
Vlandis v. Kline, 412 U.S. 441 (1973)	26
Zobel v. Williams, 457 U.S. 55 (1982)	*passim*
Constitutional Provisions:	
Federal:	
U.S. Const. art. I, § 8	2, 3
U.S. Const. art. IV, § 2	2, 3
U.S. Const. amend. XIV	*passim*
U.S. Const. amend. XIV, § 1	2, 3
State:	
N.M. Const. art. VIII, § 5 (1921)	25
N.Y. Const. art. V, § 6 (1964) (effective Jan. 1, 1965)	*passim*
N.Y. Const. art. V, § 6 (1949) (effective Jan. 1, 1950) (amended 1969)	8, 9

	Page
N.Y. Const. art. V, § 6 (1945) (effective Jan. 1, 1946) (amended 1949)	8
N.Y. Const. art. V, § 6 (1929) (effective Jan. 1, 1930) (amended 1945)	7
N.Y. Const. art. V, § 6 (1894) (amended 1929)	6
N.Y. Const. art. XIX, § 1 (1941)	8, 9
Statutory Provisions:	
Federal:	
28 U.S.C. § 1254(2)(1982)	2
28 U.S.C. § 1343(3)(1982)	2
28 U.S.C. § 1343(4)(1982)	2
28 U.S.C. § 2201 (1982)	2
28 U.S.C. § 2202 (1982)	2
38 U.S.C. § 101(9)(1982)	10
38 U.S.C. § 101 (29)(1982)	10
38 U.S.C.A. § 101 (1979 & 1985 Supp.)	10
42 U.S.C. § 1983 (1982)	2, 11
50 U.S.C. app. § 455(b)(1982)	6, 23-24
Fed. R. Civ. P. 65	2
Act of Mar. 3, 1865, ch. 79, 13 Stat. 487	6
Act. of July 4, 1864, ch. 237, 13 Stat. 379	6
Act. of July 1, 1864, ch. 201, 13 Stat. 342	6

	Page
Act. of Feb. 24, 1864, ch. 13, 13 Stat. 6	6
Act. of Mar. 3, 1863, ch. 75, 12 Stat. 731	6
Act. of July 17, 1862, ch. 201, 12 Stat. 597	6
State:	
P.R. Laws Ann. tit. 29, § 812 (Equity 1982 Supp.)	35
P.R. Laws Ann. tit. 29, § 814 A (Equity 1982 Supp.)	35
N.Y. Civ. Serv. Law § 85(1)(a) (McKinney 1983)	*passim*
N.Y. Civ. Serv. L. § 85 (1)(c)(2) (McKinney 1983)	10
N.Y. Civ. Serv. L. § 85(1)(c)(4) (McKinney 1984-85 Supp.)	10
Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 499	17
Act of June 3, 1983, ch. 219, § 1, 1983 N.Y. Laws 415 (McKinney)	10
Act of June 8, 1976, ch. 313, 1976 N.Y. Laws 840 (McKinney)	10
Act of June 11, 1973, ch. 694, § 1, 1973 N.Y. Laws 2267 (McKinney) (effective June 1, 1973)	9
Act of May 22, 1972, ch. 417, § 1, 1972 N.Y. Laws 1706 (McKinney)	9
Act of June 17, 1971, ch. 438, § 1, 1971 N.Y. Laws 1305 (McKinney)	9

	Page
Act of Mar. 16, 1970, ch. 80, § 1, 1970 N.Y. Laws 778 (McKinney)	9
Act of Mar. 11, 1969, ch. 31, § 1, 1969 N.Y. Laws 88	9
Act of May 21, 1968, ch. 316, § 1, 1968 N.Y. Laws 1129 (McKinney)	9
Act of May 2, 1967, ch. 806, § 1, 1967 N.Y. Laws 2187 (McKinney)	9
Act of Aug. § 1, 1966, ch. 908, § 1, 1966 N.Y. Laws 2695 (McKinney)	9
Act of Apr. 15, 1958, ch. 790, 1958 N.Y. Laws 943	10
Act of Apr. 3, 1951, ch. 505, 1951 N.Y. Laws 1259	10
Act of Apr. 8, 1930, ch. 374, 1930 N.Y. Laws 795 (effective Apr. 8, 1930)	7
Act of May 12, 1921, ch. 702, 1921 N.Y. Laws 2483 (effective May 12, 1921)	7
Act of May 25, 1887, ch. 464, 1887 N.Y. Laws 579	7
Act of Apr. 23, 1887, ch. 195, 1887 N.Y. Laws 213	7
Act of Mar. 1, 1886, ch. 29, 1886 N.Y. Laws 37	7
Act of May 8, 1885, ch. 240, 1885 N.Y. Laws 407	6
Act of May 29, 1884, ch. 410, 1884 N.Y. Laws 487	6

	Page
Act of Feb. 10, 1865, ch. 29, 1865 N.Y. Laws 39	6
Act of Apr. 17, 1863, ch. 184, 1863 N.Y. Laws 320	6
Act of Feb. 21, 1863, ch. 14, 1863 N.Y. Laws 18	6
Other Authority:	
B. Fernow, *New York in the Revolution* (1887)	6, 24
History of the State of New York (A. Flick ed. 1962)	6
C. Lincoln, *The Constitutional History of New York* (1906)	7
E. Murdock, *Patriotism Limited 1862-1865* (1967)	6, 24
J. Roberts, *New York in the Revolution as a Colony and a State* (1898)	6, 24
E. Upton, *The Military Policy of The United States* (1917)	24
Proclamation No. 4373, 3A C.F.R. 48 (1975)	10
N.Y. S. & Ass. Con. Res. 6094, 208th Sess., Mar. 20, 1985	9
N.Y. S. & Ass. Con. Res., 167th Sess., 1944 N.Y. Laws 1769 (McKinney)	8
N.Y. S. & Ass. Con. Res., 165th Sess., 1942 N.Y. Laws 2125 (McKinney)	8
N.Y. Assembly Memorandum in Support of Legislation	10

	Page
1953 Op. N.Y. Att'y Gen. 147	10
1951 Op. N.Y. Att'y Gen. 112	10
1946 Op. N.Y. Att'y Gen. 156	9, 10, 24
1930 Op. N.Y. Att'y Gen. 426	10

No. 84-1803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellant,

vs.

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT

PERTINENT OPINIONS BELOW

On February 15, 1985, the United States Court of Appeals for the Second Circuit rendered its decision and entered judgment. (A1).[1] This decision is reported. *Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d 266 (2d Cir. 1985), *prob. juris. noted sub nom. Attorney General of State of New York v. Soto-Lopez*, 105 S. Ct. 3523 (1985) ("*Soto-Lopez II*"). On

[1] References to pages in the appendix to the Jurisdictional Statement are indicated as A ____.

March 8, 1984, the United States District Court for the Southern District of New York rendered a decision granting the cross-motion of defendants for summary judgment and dismissed the complaint. (*"Soto-Lopez I"*) (A37). This decision is not reported.

JURISDICTION

This is an individual civil action for declaratory and injunctive relief pursuant to the fourteenth amendment to the United States Constitution and 42 U.S.C. § 1983 (1982). The United States Court of Appeals for the Second Circuit held that art. V, § 6 of the New York Constitution and § 85(1)(a) of the New York Civil Service Law were invalid under the United States Constitution. The plaintiffs asserted that the district court had jurisdiction under 28 U.S.C. §§ 1343(3), (4); 2201, 2202 (1982) and Fed. R. Civ. P. 65.

The court of appeals entered judgment on February 15, 1985. (A38). The Attorney General of the State of New York filed a timely notice of appeal to this Court on May 10, 1985. (A39). The appeal was docketed on May 15, 1985. This Court noted probable jurisdiction on July 1, 1985.

This Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The court of appeals concluded that the challenged New York constitutional and statutory provisions denied plaintiffs equal protection of the laws under the fourteenth amendment and the right to interstate travel in violation of the United States Constitution. The source of the latter right has been variously attributed to the privileges and immunities clause of article IV, the commerce clause and the privileges and immunities clause of the fourteenth amendment. For the convenience of the Court, each of these provisions is set forth below. The New York constitutional and statutory provisions challenged by appellees are set forth below.

U.S. Const. art. I, § 8:

The Congress shall have Power. . .To regulate Commerce . . . among the several States. . . .

U.S. Const. art. IV, § 2:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . .

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Const. art. V, § 6 (1964) (effective Jan. 1, 1965):

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to

receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

N.Y. Civ. Serv. Law § 85 (1)(a) (McKinney 1983):

1. Definitions.

(a) The terms "veteran" and "non-disabled veteran" mean a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion or at the time of retention, as the case may be.

STATEMENT OF THE CASE

I. THE FACTS OF THIS CASE

The material facts are not in dispute. Both Soto-Lopez and Baez-Hernandez ("plaintiffs") are American citizens. (A4). Each plaintiff resided in the Commonwealth of Puerto Rico at the time he entered the United States Army. *Id.* Both served during "time of war" as defined by statute. N.Y. Civil Serv. Law § 85(1)(c)(4) (McKinney Supp. 1984-85). Soto-Lopez entered the army in 1961 and was discharged in 1963. (A5). Baez-Hernandez entered the army in 1958 and served on active duty until 1960; in 1970, he was recalled to active duty for 15 days, during which he suffered an injury and was discharged with a partial disability (A4). Soto-Lopez and Baez-Hernandez became New York State residents in 1965 and 1968, respectively. (A4, A5).

Many years later, in 1980, both took New York City Civil Service competitive examinations and were awarded additional points because they claimed that they were eligible veterans. *Id.* The New York City Civil Service Commission subsequently cancelled the awards when it discovered that plaintiffs had not been New York State residents at the time they entered the Army. *Id.* This led to restoration of their original lower rankings on the eligibility lists compiled from the examinations. Apparently, Baez-Hernandez eventually received a civil service appointment from one of the eligibility lists, but he claims that his appointment was substantially delayed, with a resulting loss in wages and seniority, due to the denial of additional veteran preference credit. (A5). As of the date of the decision of the court of appeals, Soto-Lopez had not received a civil service appointment.

II. A BRIEF HISTORY OF NEW YORK VETERAN BONUS AND CIVIL SERVICE PREFERENCE PROVISIONS

Since the American Revolution, New York has demonstrated its continuing commitment to a policy of encouraging its residents to join the military service and compensating veterans for the

disruption to their lives which their service in time of war has caused. During the Revolution, New York responded to requests from the Continental Congress to raise troops by offering cash and other bounties to encourage enlistment in the Continental Army and in the state militia and levies.[2] Throughout the Civil War, New York offered generous bonuses to residents who enlisted to serve in the armed services.[3] The offer of bonuses served as an incentive to help New York fill its quota of soldiers under the laws of the United States. *See, e.g.*, Act of Mar. 3, 1865, ch. 79, 13 Stat. 487; Act of July 4, 1864, ch. 237, 13 Stat. 379; Act of July 1, 1864, ch. 201, 13 Stat. 342; Act of Feb. 24, 1864, ch. 13, 13 Stat. 6; Act of Mar. 3, 1863, ch. 75, 12 Stat. 731; Act of July 17, 1862, ch. 201, 12 Stat. 597.[4]

Beginning in 1884, in response to the plight of many Union veterans of the Civil War, New York enacted a series of statutes providing them preferential treatment in civil service and other government positions.[5] In 1894, New York incorporated the statutory civil service preference for Union veterans in its constitution. N.Y. Const. art. V, § 6 (1894) (amended 1929).

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[2] B. Fernow, *New York in the Revolution* 4-162 (1887); J. Roberts, *New York in the Revolution as a Colony and a State* 12-14 (1898). *See also* 4 *History of the State of New York* 1-31 (A. Flick ed. 1962).

[3] Governor Morgan offered a state bounty, for $50, on his own initiative in July, 1862 in response to President Lincoln's call for troops. E. Murdock, *Patriotism Limited 1862-1865*, at 19 (1967). On February 21, 1863, the Legislature ratified the Governor's action and enacted it into law. Act of Feb. 21, 1863, ch. 14, 1863 N.Y. Laws 18. Two months later, the Legislature enacted a a comprehensive system with higher bounties for volunteers serving in regiments from New York. Act of Feb. 17, 1863, ch. 184, 1863 N.Y. Laws 320. After President Lincoln's last call for troops on December 19, 1864, the Legislature again increased the bounties to volunteers enlisting from New York. Act of Feb. 10, 1865, ch. 29, 1865 N.Y. Laws 39.

[4] The modern codification of the notion that each state should provide a certain proportion of men for service in the Nation's armed forces appears at 50 U.S.C. app. § 455(b) (1982).

[5] *See, e.g.*, Act of May 29, 1884, ch. 410, 1884 N.Y. Laws 487 (civil service preference for Union veterans); Act of May 8, 1895, ch. 240, 1885 N.Y. Laws

(Footnote Continued)

Shortly after the First World War, New York enacted a statute which provided a preference in certain public employment to veterans of *any* war who had entered the armed forces as residents of New York. Act of May 12, 1921, ch. 702, 1921 N.Y. Laws 2483 (effective May 12, 1921) (reproduced in supplementary appendix at S-1).[6] The statute not only offered preferences to persons who had entered the armed forces from New York and served in wars occurring before 1921, but promised the same bonus to all New York residents who served in any *future* war.

In 1929, this law, as it applied to disabled veterans, was enshrined in the New York Constitution. N.Y. Const. art. V, § 6 (1929) (effective Jan. 1, 1930) (amended 1945) (reproduced in supplementary appendix at S-3). In the following year, the Legislature amended the 1921 law to limit its application to disabled veterans. Act of Apr. 8, 1930, ch. 374, 1930 N.Y. Laws 795 (effective Apr. 8, 1930). All persons who entered the armed forces as New York residents since 1921, including those who served during the Second World War, have been immediately eligible upon entry for veteran preferences if they became disabled during time of war.

Almost immediately after Pearl Harbor, New York legislators introduced resolutions to amend the Constitution to extend the

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(Footnote Continued)
407, 411-12 (preference for Union veterans as watchmen and orderlies in public buildings); Act of Mar. 1, 1886, ch. 29, 1886 N.Y. Laws 37 (civil service preference for Union veterans); Act of Apr. 23, 1887, ch. 195, 1887 N.Y. Laws 213, 218 (preference for Union veterans as watchmen and orderlies in public buildings) (continued in each appropriation act until 1894); Act of May 25, 1887, ch. 464, 1887 N.Y. Laws 579 (civil service and public works preference for Union veterans). For a brief history of these provisions, see C. Lincoln, 3 *The Constitutional History of New York* 324-28 (1906).

[6] This statute had its genesis in 1919. Immediately after the First World War, the Legislature adopted concurrent resolutions to provide substantially the same benefits as in the 1921 law. The Legislature adopted the same resolutions in 1921, but the proposed constitutional amendment failed to receive approval at the general election later that year. *See August v. Bronstein*, 369 F.Supp. 190, 192 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 419 U.S. 901 (1974).

veteran preference to all persons entering the armed forces from New York who served during time of war, whether disabled in service or not.[7] The amendment was adopted at the 1945 election. N.Y. Const. art. V, § 6 (1945) (effective Jan. 1, 1946) (amended 1949) (reproduced at supplementary appendix at S-4). The 1945 amendment retained the absolute preference for veterans over all other applicants (disabled veterans came before all other veterans), without regard to standing on civil service lists. *Id.* The law, however, required that benefits be used within five years of discharge. *Id.* Thus, all persons entering the armed forces since 1945 from this state have been immediately eligible upon entry for future veteran preferences if they served in time of war, regardless of whether they were disabled.

The 1945 constitutional provision, according *absolute* preference to veterans for civil service positions regardless of qualifications, had harsh consequences for applicants for civil service employment who were not eligible for the preference. Consequently, in 1949, the Constitution was amended to substitute the current limited preference credit for veterans who entered from New York. N.Y. Const. art. V, § 6 (1949) (effective Jan. 1, 1950) (amended 1964) (reproduced in supplementary appendix at S-5). Under the amendment, eligible veterans were entitled to have points added to their scores on civil service examinations. Nondisabled veterans were entitled to a single five point credit for an original appointment and a single two and a half point credit for a promotion; disabled veterans were entitled to a ten point credit for an original appointment and a one-time five point credit for a promotion. *Id.* By removing the requirement that the preference be exercised within five years of discharge, the

[7] The Legislature speedily adopted these concurrent resolutions on April 23 and April 24, 1942, after the constitutionally mandated three-month waiting period. N.Y. S. & Ass. Con. Res., 165th Sess., 1942 N.Y. Laws 2125 (McKinney). The succeeding Legislature readopted these resolutions in slightly modified form (which necessitated reintroduction in the following year. *See* N.Y. Const art. XIX, § 1). N.Y. S. & Ass. Con. Res., 167th Sess., 1944 N.Y. Laws 1769 (McKinney). In March 1945, before the war ended, the Legislature readopted the 1944 concurrent resolutions and submitted them to the people in the November 1945 general election.

1949 amendment reduced further the adverse impact of the preference on non-eligible applicants for civil service employment. *Id.* This section was amended most recently in 1964, when New York made certain technical amendments, but the program of limited credit adopted in 1949 remains unchanged. N.Y. Const. art. V, § 6 (1964) (effective Jan. 1, 1965) (set forth at p. 3, *ante*).[8]

Section 6 is self-executing. 1946 Op. N.Y. Att'y Gen. 157. Any person who enters the armed forces from New York, serves in time of war, and is discharged under honorable circumstances, is entitled to enforce § 6 even if the Legislature had not acted to define "time of war." *See id.* The Legislature has, however, in implementing the Constitution, consistently defined "time of war" as the period of actual hostilities during a time of war, or as some other, longer period adopted by the federal government. For example, during the Vietnam War, the relevant conflict for purposes of this appeal, the Legislature repeatedly defined the term "time of war" to coincide with the period of actual or anticipated hostilities involving American soldiers.[9] In 1973, the Legislature defined the Vietnam War as ending on March 29, 1973, the date the last American troops left Vietnam. Act of June 11, 1973, ch. 694, § 1, 1973 N.Y. Laws 2267 (McKinney) (effective June 11, 1973). Two years later, President Ford designated

[8] On March 20, 1985, in order to comply with the *Soto-Lopez II* decision, the Legislature adopted concurrent resolutions amending art. V, § 6 to eliminate the requirement that a veteran be a resident at the time of entry into the armed forces. N.Y. S. & Ass. Con. Res. 6094, 208th Sess. This proposal cannot become law, however, unless readopted by a succeeding Legislature and approved by the people at a general election. N.Y. Const. art. XIX, § 1 (1941).

[9] In 1966, the Legislature defined "time of war" as January 1, 1963 through July 1, 1967. Act of Aug. 1, 1966, ch. 908, § 1, 1966 N.Y. Laws 2695 (McKinney). Although there is no easy answer to the date hostilities involving American forces in Vietnam began, 1963 coincides with the beginning of large-scale involvement by American advisers. The Legislature extended this period annually until the end of the war. Act of May 2, 1967, ch. 806, § 1, 1967 N.Y. Laws 2187 (McKinney); Act of May 21, 1968, ch. 316, § 1, 1968 N.Y. Laws 1129 (McKinney); Act of Mar. 11, 1969, ch. 31, § 1, 1969 N.Y. Laws 88 (McKinney); Act of Mar. 16, 1970, ch. 80, § 1, 1970 N.Y. Laws 778 (McKinney); Act of June 17, 1971, ch. 438 § 1, 1971 N.Y. Laws 1305 (McKinney); Act of May 22, 1972, ch. 417, § 1, 1972 N.Y. Laws 1706 (McKinney).

May 7, 1975 as the last date of the "Vietnam era," Proclamation No. 4373, 3A C.F.R. 48 (1975), and in 1977 Congress defined the "Vietnam era" for purposes of determining eligibility for veteran benefits for those persons who served in the armed forces during the Vietnam War as August 5, 1964 through May 7, 1975. 38 U.S.C. § 101 (29) (1982). New York then redefined the Vietnam War to end on the date adopted by the federal government. N.Y. Civ. Serv. Law § 85(1)(c)(4) (McKinney 1984-85 Supp.) (as amended by Act of June 3, 1983, ch. 219, § 1, 1983 N.Y. Laws 415 (McKinney)) (reproduced in supplementary appendix at S-10); *see* N.Y. Assembly Memorandum in Support of Legislation (purpose of amendment to conform with date established by federal government).[10]

III. FEDERAL COURT LITIGATION REGARDING ART. V, § 6 AND § 85

A. *Gianatasio v. Kaplan*

The constitutionality of art. V, § 6 was challenged and ultimately upheld by this Court in *Gianatasio v. Kaplan*, 142 Misc. 611 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 257 N.Y. 531, 178 N.E. 782 (1931), *appeal dismissed for want of a substantial federal question*, 284 U.S. 595 (1932).

[10] The Legislature's definition of "time of war" for previous conflicts also coincides with actual hostilities involving American troops or the definitions adopted by the federal government for veteran benefit awards. *See* 1946 Op. N.Y. Att'y Gen. 160-1; 1930 Op. N.Y. Att'y Gen. 426. The Legislature defined the Second World War as starting on December 7, 1941, the date Japan attacked Pearl Harbor, and ending on the date Japan surrendered, September 2, 1945. N.Y. Civ. Serv. Law § 85(1)(c)(2) (McKinney 1983). Similarly, during the Korean War, the Legislature defined that time of war to coincide with the period of actual hostilities. Act of Apr. 3, 1951, ch. 505, 1951 N.Y. Laws 1259 (hostilities subsequent to June 25, 1950); *see also* Act of Apr. 15, 1958, ch. 790, 1958 N.Y. Laws 943, 994 (June 26, 1950 through July 27, 1953, the date of the armistice); 1953 Op. N.Y. Att'y Gen. 147-48 (same). Subsequently, the federal government extended its definition of the Korean War for awarding veteran benefits to January 31, 1955. 38 U.S.C. § 101(9) (1982). New York then did the same. Act of June 8, 1976, ch. 313, 1976 N.Y. Laws 840. Persons who served in Grenada and Lebanon are not eligible because these actions did not constitute "time of war," *see* 1953 Op. N.Y. Att'y Gen. 147; 1951 Op. N.Y. Att'y Gen. 112-3; 1930 Op. N.Y. Att'y Gen. 426, and are not defined as such by the federal government. *See* 38 U.S.C.A. §101 (1979 & 1982 Supp.).

B. *August v. Bronstein*

These veteran preference provisions were the subject of renewed litigation, commenced in 1973, before a three-judge panel. In *August v. Bronstein*, plaintiffs alleged that "Article V, § 6 of the New York Constitution and section 85 of the New York Civil Service Law . . . [were] unconstitutional and violate[d] their right to travel and their right to equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution." *August v. Bronstein*, 369 F.Supp. 190, 191 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 417 U.S. 901 (1974). As did the plaintiffs in this case, the plaintiffs in *August* claimed that these provisions were unconstitutional because they limited the grant of the five-point preference in competitive Civil Service examinations to persons who were residents of New York at the time of induction into the armed services. After a review of the history of New York's veteran preference laws, the three-judge court, in an opinion authored by Judge Friendly, concluded that New York's long-standing policy to favor veterans who were residents of New York at the time of induction was a modest one, amounting to "a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the State thereafter." 369 F.Supp. at 193. The court held that the preference did not violate the equal protection clause or violate plaintiffs' right to travel. 369 F.Supp. at 195. Accordingly, the court dismissed plaintiffs' complaint. *Id.* This Court summarily affirmed. *See* 417 U.S. 901.

C. *Soto-Lopez v. New York City Civil Service Commission*

On February 22, 1983, the plaintiffs initiated this action as individuals under 42 U.S.C. § 1983 (1982). The complaint alleges that art. V, § 6 of the New York Constitution and § 85(1)(a) of the New York Civil Service Law, insofar as they provide that residents of the State of New York who enter the armed forces

while residents become eligible for veteran preference points in subsequent civil service examinations, deny plaintiffs equal protection of the laws and their right to travel in violation of the United States Constitution. (A6). Plaintiffs sought declaratory and injunctive relief. *Id.* Both plaintiffs and the New York State Attorney General filed motions for summary judgment. In an "endorsed memorandum," the district court rejected plaintiffs' contentions and concluded that

> it is neither an infringement on the rights of a resident of another state to travel nor of equal protection of the laws for New York to promise to its own sons and daughters departing for wartime service in the armed forces that upon their honorable return, they are entitled to a modest civil service hiring advantage.

(A37). Accordingly, the district court granted defendants' cross-motion for summary judgment. *Id.*

The court of appeals reversed. (A1). Although this Court held in *August v. Bronstein*, 417 U.S. 901, that the very New York veteran preference provisions challenged here did not deny veterans equal protection of the laws or violate their right to travel, the court of appeals believed that *August* was no longer binding precedent in light of this Court's decision in *Zobel v. Williams*, 457 U.S. 55 (1982). *Zobel* invalidated, on equal protection grounds, an Alaska statute which retroactively distributed oil revenues from state-owned land to Alaska's citizens based on the length of their residence in the state. Although the district court found the New York preference provisions to be prospective, the court of appeals declared these provisions were like the Alaska statute which this Court struck down in *Zobel* because they were "plainly retrospective." (A20). The court of appeals also found the New York provisions to be different from the Alaska scheme because New York's eligible veterans were entitled to exercise the bonus only once. *Id.* Thus, the court observed, "the distinction created by the New York provisions, though fixed, is not immutable." *Id.* It concluded, however, that New York's preference credit "does not rationally further a compelling, or even a legitimate, interest of the State." *Id.*

The court of appeals listed the four purposes New York advanced in support of the provisions:

> (a) compensating veterans for the service they have performed, (b) lessening the burden imposed by military service, (c) encouraging veterans to settle in New York and enter the State's civil service at the end of their military service, and (d) encouraging service in the armed forces.

(A21). It concluded, however, that these purposes, when framed neutrally without respect to the residence of the person to be rewarded or encouraged, did not bear a rational relationship to the distinction drawn by the New York provisions according to the veteran's residence at the time of induction. (A25). The court therefore held that these provisions violated the equal protection clause. *Id.*

Judge Oakes declined to join this branch of the court's opinion. He concluded that

> within the parameters of rational-relationship analysis, the distinction drawn by the veteran preference statute is not irrational. It is very difficult to say, *e.g.*, that "[t]" personal burdens resulting from military service simply are not related to the state from which the individual entered the armed forces" . . . because those burdens may vary from state to state.

(A35) (quoting *Zobel*, 457 U.S. at 71 (O'Connor, J., concurring).

The court of appeals also examined the challenged provisions in light of plaintiffs' constitutionally protected right to travel. The court recognized that the mere fact that a law affects travel does not raise an issue of constitutional dimension. (A28). "Rather," the court said,

> a statute implicates the constitutional right to travel when it actually deters such travel, . . . or when impedance of travel is its primary objective, . . . or when it uses " 'any classification which serves to *penalize* the

> exercise of that right' " . . . . Where a classification is found to implicate the right to travel, it will be upheld only if it is found to "be necessary to promote a compelling governmental interest."

(A28) (emphasis in original).

The court found that the New York provisions created distinctions between newcomers and longer term residents, that they penalized veterans who were not residents of New York at the time of their induction (albeit that the penalty was lessened by the modest proportions of the bonus accorded eligible veterans), and that they impaired the federal interest in free interstate migration. (A29, A30). It concluded that the New York provisions burdened the right to travel. Because there was no showing that the provisions were necessary to promote a compelling state interest, they violated plaintiffs' constitutionally protected right to travel. (A30). Judge Oakes joined this branch of the court's opinion. (A35).

Finally, the court of appeals determined that, rather than striking down the invalidated provisions entirely, the New York Legislature would have preferred to extend the veteran preference to otherwise qualified veterans who were not New York residents at the time of entrance into the armed forces. Accordingly, the court held "that the proper remedy here is to require the State . . . to extend the veteran preference to otherwise qualifying veterans who were not residents of New York at the time they entered the armed forces." (A32).

The court of appeals ordered the district court on remand to enter declaratory and injunctive relief requiring the State and its agents to extend the veteran preference to all otherwise qualifying veterans who had not been residents of New York at the time they entered the armed forces. (A32, A33). The court also remanded the case to the district court for further proceedings to determine whether plaintiffs in fact met all the other requirements for veterans preference credits. (A33, A34).

SUMMARY OF ARGUMENT

The holding of the court of appeals that art. V, § 6 of the New York Constitution and § 85(1)(a) of the New York Civil Service Law violate the United States Constitution is in direct conflict with a recent holding of this Court that these provisions are constitutional. *August v. Bronstein*, 417 U.S. 901. The *August* decision is binding precedent unless and until overruled by this Court. Neither *Zobel v. Williams*, 457 U.S. 55, nor *Hooper v. Bernalillo County Assessor*, 105 S. Ct. 2862 (1985), overruled *August*. Therefore, the court of appeals should have followed *August* and come to the opposite result.

Under equal protection analysis, heightened judicial scrutiny is reserved for cases where some other independent right is at stake or where there is reason to infer antipathy, *e.g.*, in the case of racial classifications. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). That is not the situation here. The rational basis standard applies to this case. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974); *Jones v. Helms*, 452 U.S. 412, 426 (1981). These principles also govern plaintiffs' right to travel challenge because right to travel analysis is little more than a particular application of equal protection analysis. *See Zobel*, 457 U.S. at 60 n.6.

Here, the challenged provisions are constitutional because they are rationally related to the advancement of several legitimate government interests: (1) to encourage New York residents, including new residents, to join the armed services to defend the Nation during time of war; (2) to compensate residents for service in time of war by aiding these veterans to reestablish themselves upon their return home; (3) to encourage people to settle in New York after wartime military service; (4) to provide for the benefit of the public a uniquely valuable class of public servants who possess not only a knowledge of the local environment but also useful experience acquired through military service in time of war.

States do not deny equal protection or violate the right to travel by imposing residency requirements in connection with public

employment at the time of application. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). There is no fundamental right to public employment for purposes of the equal protection clause. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 104 S. Ct. 1020, 1028 (1984).

The statutes examined by this Court in *Zobel* and *Hooper* differed from the New York provisions challenged here in several constitutionally significant respects. For example, the New York provisions neither impose a *durational* residency requirement, as in *Zobel*, nor require residence in the state on an arbitrarily *fixed date*, as in *Hooper*. New York's provisions are entirely prospective with regard to plaintiffs and all similarly situated veterans because eligibility for the bonus is determined at the time of entry into the military. In contrast, the statutes construed in *Zobel* and *Hooper* applied *only* retroactively.

Because all residents of New York are eligible at the time the benefit is established, the right to travel is not implicated. Instead, the law operates to attract non-residents to become New York residents and enter military service. Even if the New York veteran preference provisions were determined to implicate the right to travel, the effects of the laws are insufficient to raise issues of constitutional dimensions. The benefits they accord are modest and their effects dissipate over time. Furthermore, the New York veteran preference credit can be awarded only once, at the time of initial application (with a smaller one-time award on promotion). The *Zobel* and *Hooper* statutes, however, provided continuing, life-long benefits.

ARGUMENT

I. THE DECISIONS OF THIS COURT IN *ZOBEL* AND *HOOPER* DO NOT VITIATE THE PRECEDENTIAL EFFECT OF *AUGUST*

Plaintiffs are asking this Court to overrule one of its recent decisions issued less than a dozen years ago, in which, in the face of identical challenges, it held the same veteran preference provisions challenged here, art. V, § 6 of the New York State Constitution and § 85(1)(a) of the New York Civil Service Law,[11] constitutional. *August v. Bronstein*, 417 U.S. 901, *aff'g mem.*, 369 F.Supp. 190 (S.D.N.Y. 1974) (three-judge court). In that case, the plaintiffs, current New York residents who had enlisted in the armed forces while residing outside the state, sought a declaratory judgment holding that these provisions denied them the equal protection of the laws and violated their right to travel. The three-judge court rejected these contentions. It stated that the preference compensated New York veterans " 'in some measure for the disruption of a way of life and often of previous employment occasioned by service in the armed forces.' " 369 F.Supp. at 193 (quoting *Russell v. Hodges*, 470 F.2d 212, 218 (2d Cir. 1972) (Friendly, J.)). In addition, it was "a token of gratitude conferred by New York upon its sons who enter their country's service in time of war, and perhaps an encouragement to return to the service of the state thereafter." 369 F.Supp. at 193. Since the "modest" veteran credit was substantially related to these legitimate state purposes, it did not deny plaintiffs equal protection. The court also held, based on *Sturgis v. Washington*, 414 U.S. 1057 (1973), and *Spatt v. New York*, 414 U.S. 1058 (1973),

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[11] Section 85(1)(a) was amended in 1982. The amendment did not modify the requirement of residency at the time of entry into the armed forces. Before 1982, only citizens of the state were eligible under art. V, § 6 and § 85(1)(a) for veteran preference credit. In 1979, a federal district court held that restriction of the preference to citizens and denying it to legally resident alien veterans violated the equal protection clause. *Andrade v. Nadel*, 477 F. Supp. 1275 (S.D.N.Y. 1979). As a result, New York amended § 85(1)(a) to include lawful permanent resident aliens within the definition of "veteran." Act of June 1, 1982, ch. 133, § 5, 1982 N.Y. Laws 499, 501

that this limited, non-durational preference did not infringe or penalize the right to travel. 369 F.Supp. at 194-95. This Court summarily affirmed. 417 U.S. 901.

This Court's summary affirmance of the decision of the three-judge court in *August* is an affirmance of the judgment and is a decision on the merits. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Ohio ex rel. Easton v. Price*, 360 U.S. 246, 247 (1959). Even though this Court's affirmance cannot be regarded as an adoption of the reasoning of the lower court, it necessarily constitutes a holding that the precise laws at issue here neither deny plaintiffs equal protection of the laws nor unlawfully impair their right to interstate travel. *See McCarthy v. Philadelphia Civil Service Comm'n.*, 424 U.S. 645, 646 (1976); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). That holding is binding on the lower courts and they are precluded "from coming to opposite conclusions on the precise issues presented and necessarily decided," *Mandel*, 432 U.S. at 176, by this Court's summary affirmance.

Although the court of appeals acknowledged this settled law, it believed this Court's decision in *Zobel v. Williams*, 457 U.S. 55 (1982), has implicitly overruled *August*. (A13, A14). A more direct indication of a doctrinal change by this Court must exist, however, before a lower court departs from a clearly established precedent of this Court. *Mandel*, 432 U.S. at 176; *Hicks*, 422 U.S. at 345. Just as lower courts were not free after this Court's summary affirmance in *Tucker v. Salera*, 424 U.S. 959 (1976), *aff'g mem.*, 399 F.Supp. 1258 (E.D. Pa. 1975) (three-judge court), to validate as constitutional the provisions of the Pennsylvania law that required independent candidates for political office to meet certain early filing deadlines for primary elections, the Second Circuit was not free to invalidate the New York laws which this Court expressly approved in *August*.[12] *See Mandel*, 432 U.S. at 176.

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[12] In *Mandel* this Court described the relevant facts in *Salera* as follows:

> In *Salera*, a three-judge court declared unconstitutional a Pennsylvania law setting the deadline for an independent candidate to
>
> *(Footnote Continued)*

As recently as last term, this Court took special note of *August* and declined to express any disagreement with its outcome. *See Hooper v. Bernalillo County Assessor*, 105 S. Ct. at 2868 n.12. As demonstrated below, nothing in *Zobel* or in *Hooper* overrules *August*, implicitly or otherwise.

This Court does not lightly overrule recent precedent. The reasons for adhering to *stare decisis*, generally and in this context, are manifold. Among them are

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining the public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Even as to constitutional questions, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 104 S. Ct. 2305, 2311 (1984) (declining invitation to overrule constitutional determination in a recent prior decision). For "in a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem v. Helm*, 463 U.S. 277, 311 (1983) (Burger, C.J., dissenting) (quoting *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-20 (1983)).

(Footnote Continued)

> gather signatures to obtain a place on the ballot 244 days before the general election in a Presidential election year. . . . In declaring the Pennsylvania statute invalid, the three-judge court relied . . . solely on the early deadline for submission of the necessary signatures. The court found that the deadline substantially burdened ballot access of independents by requiring them to obtain the necessary signatures at a time when the election issues were undefined and the voters were apathetic. . . . This Court summarily affirmed the judgment of the three-judge court in *Salera*.

432 U.S. at 175.

Seven of the Justices on the *August* Court sit on this Court. Article V, § 6 and § 85(1)(a) are unchanged in any relevant respects. There have been no significant developments in constitutional doctrine since 1974 which would justify changing the result in *August*; both *Zobel* and *Hooper* merely applied pre-*August* decisions. Accordingly, this Court should reject plaintiffs' invitation to change the result in *August* because neither the plaintiffs nor the court below have advanced sufficiently compelling reasons for doing so.

II. ARTICLE V, § 6 AND § 85 ARE CONSISTENT WITH THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT

Under art. V, § 6 of the New York Constitution and its statutory counterpart, any bona fide resident of New York, regardless of the length of residence, who enters the armed forces and serves during time of war is promised that upon receiving an honorable discharge, he or she will be eligible to claim bonus points on competitive civil service entrance examinations. As a result, these entrants are accorded a modest but significant advantage over the vast majority of other residents who apply for public sector jobs. New York's law does not contain restrictions of the kind held problematic in other cases. It imposes no durational residency requirements, in contrast to the Alaska statute challenged in *Zobel*. It creates no requirement of residency on an arbitrary and retroactively fixed date, unlike the New Mexico statute challenged in *Hooper*.

For more than two centuries, whenever this Nation has been at war, states have offered cash and other bonuses to their residents to encourage them to serve in the armed forces and to compensate them for the disruption to their lives and the interruption in their residence caused by service in time of war. Article V, § 6 operates in exactly the same way. Under the settled jurisprudence of this Court, these continue to be legitimate purposes and the New York provisions are rationally related to them.

A. The Plaintiffs' Equal Protection Claim Turns on Whether There Is a Rational Basis for the Initial Residency Rule

The plaintiffs have challenged the New York veteran preference credit on equal protection and right to travel grounds. The court of appeals relied on both. (A35). This Court, however, recently reiterated that "[w]hen a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper*, 105 S. Ct. at 2866 (footnote omitted); *Zobel*, 457 U.S. at 60 (footnote omitted). It rejected requests to examine the New Mexico and Alaska statutes under a right to travel analysis, stating that "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Zobel*, 457 U.S. at 60 n.6. *See also Hooper*, 105 S. Ct. at 2866 n.6. Similarly, Justice Brennan in a concurring opinion in *Zobel* declared that "the right to travel achieves its most forceful expression in the context of equal protection analysis." *Zobel*, 457 U.S. at 67. As demonstrated below in Point III, the right to travel is not implicated because the veteran preference credit promotes, rather than penalizes, the right to travel.

"Generally, a law will survive [equal protection] scrutiny if the distinction it makes rationally furthers a legitimate state purpose." *Zobel*, 457 U.S. at 60. Under these circumstances, a court is called upon only to measure the basic validity of a legislative classification. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). Where the law is supported by an identifiable legitimate state purpose, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *Id; Schweiker v. Wilson*, 450 U.S. 221, 235 (1981). Heightened judicial scrutiny is reserved for cases where some other independent right is at stake or where there is reason to infer antipathy, as in the case of racial classifications. *Feeney*, 442 U.S. at 272.

The court of appeals properly subjected the challenged laws to rational basis scrutiny,[13] although incorrectly finding no legitimate state purpose for them. (A26). New York's requirement applies prospectively, is non-durational, and imposes no "particularly invidious distinctions," *Zobel*, 457 U.S. at 60, requiring a more vigorous scrutiny. It does not discriminate against a suspect class. It does not infringe a fundamental right since it does not unreasonably burden the right to travel. See pp 32-35, *post*. Even assuming that it implicated the right to travel, this Court will not subject such state action to strict scrutiny unless some other fundamental right is infringed or a basic necessity of life is denied. *Jones v. Helms*, 452 U.S. at 425; *Memorial Hospital v. Maricopa County*, 415 U.S. at 259.[14] No such fundamental right or basic necessity of life is involved here. There simply is no fundamental right to *public* employment for purposes of the equal protection clause and the states retain wide discretion in framing employment qualifications. *Feeney*, 442 U.S. at 273; *United Building and Construction Trades Council of Camden County and Vicinity*, 104 S. Ct. at 1078. Thus, the appropriate level of

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[13] This Court subjected both the New Mexico veteran tax exemption statute in *Hooper* and the Alaska statute in *Zobel* to such rational basis scrutiny, even though one involved a retroactively fixed date and the other a durational residency requirement.

[14] This Court has consistently applied a strict scrutiny standard to residency requirements – even durational ones – in right to travel cases *only* when the residency requirement denies a basic necessity of life or infringes a fundamental right in addition to the right to travel. *See, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259 (1974) (free medical care); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits). It has applied a similar heightened level of scrutiny in privileges and immunities cases under Art. IV when a fundamental right was at stake. *See, e.g., Supreme Court of New Hampshire v. Piper*, 105 S. Ct. 1272 (1985) (opportunity to practice law).

In contrast, this Court has applied a rational basis test in right to travel cases when no other fundamental right or basic necessity of life was at stake. *Hooper*, 105 S. Ct. 2862 (1985) (tax exemption); *Zobel*, 457 U.S. at 60 (distribution of state revenues); *Jones v. Helms*, 452 U.S. 412, 422 (1981); *Sosna v. Iowa*, 419 U.S. 393, 406 (1975) (divorce).

scrutiny is rational basis and, under that standard, the veteran preference credit rationally furthers legitimate government interests.

B. Article V, § 6 Furthers Legitimate State Purposes

New York's veteran preference law furthers several important and legitimate state purposes. Principally, it serves to encourage New York residents to enter the armed services. It does so by offering incentives that are not accorded other residents who do not serve in time of war. The bonus also serves to compensate New York residents for service in the armed services in time of war, to lessen the burdens imposed by military service and to encourage individuals to settle in New York and enter the state's civil service following satisfactory completion of their military service.

Concededly, the particular distinction which the New York Legislature drew between veterans who were residents at the time of entry and all other citizens better serves some of these enumerated purposes than others. However, that fact is not a basis for invalidating the law because "rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

1. The Law Operates to Encourage New York Residents to Serve in Time of War

It is certainly a legitimate purpose for a state to encourage its residents to enter the armed forces and serve in time of war by providing a *prospective* bonus or veteran preference for them on their return, as New York has done here. That New Yorkers are well represented among the men and women who fight to defend the Nation is itself a source of pride for the residents of New York. Moreover, the federal government encourages each state to supply a fair share of the personnel which are required for the defense of the Nation. To implement this goal, § 5(b) of

the Selective Service Act directs that "[q]uotas of men to be inducted for training and service under this title shall be determined for each State . . . on the basis of the actual number of men in the several States . . . who are liable for such training and service. . ." 50 U.S.C. app. § 455(b) (1982).

The use of such bonuses and preferences to further the purpose of encouraging state residents to enter the armed services has a long and respected history. For more than two centuries, states have offered their residents bonuses to serve during time of war in the armed forces of the United States or state militias. B. Fernow, *New York in the Revolution* 4-162 (1887); E. Murdock, *Patriotism Limited 1862-1865*, at 16-18 (1967); J. Roberts, *New York in the Revolution as a Colony and a State* 12-14 (1884); E. Upton, *The Military Policy of the United States* 21-22, 35, 40-41 (1917).

Since 1921, New York has encouraged its residents to enter the armed forces and serve in time of war by providing a prospective bonus in the form of a veteran preference in the civil service upon return. New York law is rationally designed to achieve its intended effect precisely because it operates prospectively, unlike the New Mexico statute in *Hooper*.[8] Since 1921, all New York residents have known before they entered the armed forces that they were eligible upon entry for such preference.[9]

Article V, § 6 also operates automatically. *See* 1946 Op. N.Y. Att'y Gen. 157. (The role of the Legislature in defining "time of war" is simply ministerial; it has consistently adopted the period of actual hostilities or such longer period employed by the federal

[8] The New Mexico Legislature set the eligiblity date "long after the triggering event occurred." *Hooper*, 105 S. Ct. at 2867. As this Court recognized, the Legislature could not "plausibly encourage veterans to move to the State by passing such retroactive legislation." *Id.* (footnote omitted).

[9] During the Great Depression and for a short period thereafter, between 1930 and 1945, eligibility for this preference was restricted to veterans who were disabled during time of war. In 1945, New York restored the preference for all veterans, regardless of disability, which existed before 1930.

government to define the relevant war.) Thus, art. V, § 6 is different from the statute in *Hooper* in another critical respect. The person entering the armed forces knows that the veteran preference will *automatically* accrue, based on a rational definition of time of war as determined by the hostilities themselves or a longer period set by the federal government. In New Mexico, on the other hand, the constitution simply *authorized* the Legislature to award such benefits if it chose to do so. N.M. Const. art. VIII, § 5 (1921). That provision, unlike New York's, was not self-executing. *Hooper v. Bernalillo County Assessor*, 101 N.M. 172, 175, 679 P.2d 840, 843, *cert. denied*, 101 N.M. 77, 678 P.2d 705 (1984), *rev'd*, 105 S. Ct. 2862 (1985). All the New Mexico veteran preference statutes have been retroactive and the periods of eligibility have always been arbitrary with no relationship whatsoever to actual hostilities or any period employed by the federal government. *See Hooper*, 105 S. Ct. at 2864-65 nn.1-3,5. Consequently, they were not like New York's law because they could not be said to encourage service in the armed forces.

Under well-settled law of this Court, New York may impose a residency requirement, applicable at the time eligibility for an economic benefit is determined, to determine who is to receive that benefit. This Court has repeatedly declared that appropriately defined and uniformly applied bona fide residency requirements may be used to determine who is eligible to receive economic benefits, such as appointments to the civil service, *McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. at 647; lower tuition, *Martinez v. Bynum*, 103 S. Ct. 1838, 1842 (1983); welfare, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); free medical care, *Memorial Hospital v. Maricopa County*, 415 U.S. at 255, 267 and hunting licenses, *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). Indeed, states may even impose such bona fide residency requirements to determine who may exercise the fundamental right to vote. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). In approving such requirements, this Court has always been careful to distinguish between bona fide residency requirements and durational or retroactive fixed date

residency requirements.[17] *Hooper*, 105 S. Ct. at 2865; *Martinez*, 103 S. Ct. at 1841; *Zobel*, 457 U.S. at 58-59; *McCarthy* 424 U.S. at 647.

Article V, § 6 imposes such a constitutionally permissible residency requirement as of the date that eligibility for the economic benefit to be distributed in the future is determined. Under this section, New York requires that a person be a bona fide resident on the date that eligibility for veteran preference credit is initially determined – the date of entry into the armed forces. Any individual who is a resident of New York on the date of entry into the armed service qualifies, whether he or she has been a resident of the State for a day or a decade. As of that date, the resident's right to future veteran credit vests, provided two other criteria are satisfied, service in time of war and discharge under honorable circumstances.

Thus, the New York law operates in the same fashion as those statutes which require bona fide residence on the date eligibility is determined to obtain such economic benefits as civil service appointments, lower tuition, welfare, free medical care or hunting licenses. The example of lower tuition is particularly apt. This Court has repeatedly declared that a state may condition eligibility for lower tuition rates on bona fide residence.[18] In *Martinez*, this Court explained:

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in free public

[17] This Court has expressly stated that the New York provisions are "nondurational." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 263 n.9 (1979).

[18] *Martinez* v. *Bynum*, 103 S. Ct. at 1842; *Plyler* v. *Doe*, 457 U.S. 202, 227 n.22 (1982); *Id.* at 240 n.4 (Powell, J., concurring); *Vlandis* v. *Kline*, 412 U.S. 441, 453-54 (1973); *Sturgis* v. *Washington*, 414 U.S. 1058, *summarily aff'g*, 368 F. Supp. 38 (W.D. Wash. 1973) (three-judge court); *Starns* v. *Malkerson*, 401 U.S. 985, *summarily aff'g*, 326 F. Supp. 234 (D. Minn. 1970) (three-judge court).

> schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents.

103 S. Ct. at 1842-43 (footnotes omitted, emphasis in original).

The New York veteran preference credit is similar to the lower tuition statutes. New York attempts to encourage *its* residents to obtain a higher education. It does so by lowering tuition for students who are residents of the state at the time they matriculate and while they are attending school. A person who becomes a bona fide resident of the state *after* completion of school cannot under the law obtain a retroactive award of lower tuition for the years that person was not a resident because it would not serve as an incentive. Similarly, a state may choose to provide free medical care for all otherwise eligible state residents who enter a hospital, in order to make residency in that state more attractive. At the same time, a state may constitutionally exclude from coverage a person who moves to that state and claims a retroactive award of free medical care for an operation performed while that person resided in another state, because the limitation the state has prescribed is rationally related to the legitimate and limited purpose of encouraging its residents to obtain needed medical care.

Here, likewise, the district court recognized the New York veterans bonus provisions represent "a promise to its own sons and daughters departing for wartime services." (A37). The court of appeals adopted the opposite view, declaring these provisions to be "plainly retrospective," (A20), because it looked at "simply the universe of honorably discharged wartime veterans who are now New York veterans and who have passed a New York civil service examination." (A21). However, this view focuses on the law's effect of providing a reward which may be claimed after-the-fact, to the exclusion of its purpose of providing an incentive for service in the first place. The "universe" the court of

appeals defined (war veterans) simply does not exist at the time the incentive is offered and when this law is expected to serve its purposes, *i.e.*, when the individual contemplates joining the armed services. Thus, the court of appeals found that limiting the incentive to New York's own residents was not a legitimate purpose, (A25), simply because the it looked in the wrong end of the telescope.

2. The New York Law Provides Partial Compensation to Residents for Service in Time of War

The New York law also serves to compensate partially its residents for the disruption in their lives and interruption of their residence caused by service in time of war. The New York provisions lessen the burdens imposed by wartime military service by aiding veterans to reestablish themselves upon their return home. However, the law does not go so far as to attempt to mitigate the dislocations associated with picking up roots and moving to a new state which affect veterans and non-veterans alike. The veteran who returns home to New York is permitted only once to obtain bonus points in seeking government employment. Thus, the law retains its character as a straightforward attempt to ease the veteran's return to civilian life. It is unlike the "continuing bounty" which this Court invalidated in *Hooper*. *See Hooper*, 105 S. Ct. at 2868.

This Court has never held that a law prospectively authorizing compensation to a state's residents for the disruption caused by service during time of war or prospectively rewarding its residents for current or future public service was unconstitutional. This Court has simply held that residency-related laws limiting certain *retroactive* compensation for such service, *Hooper*, 105 S. Ct. at 2869, and certain *retroactive* rewards for past contributions, *Zobel*, 457 U.S. at 63, were impermissible.[9]

[9] Although there is broad language in *Hooper*, 105 S. Ct. at 2869, and *Zobel*, 457 U.S. at 63, stating that rewarding a state's own citizens for past contributions is not a legitimate purpose, the facts of those cases indicate that this purpose is impermissible for "undefined" contributions or arbitrary awards. In *Zobel*, *(Footnote Continued)*

The fundamental flaw in the statutes in both cases was that they operated retroactively and therefore served no incentive purpose for state residents. As this Court stated in *Hooper*, "[n]either the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the *retroactive apportionment of an economic benefit*." 105 S. Ct. at 2869 (emphasis supplied). The New York law, by contrast, allows prospective conferral of an economic benefit to further a present legitimate governmental need (*i.e.*, military service).

3. The New York Law Encourages People to Settle in New York and to Enter the Civil Service At the End of Their Wartime Service in the Military

The New York Law serves to encourage individuals to establish residence in New York and join the armed services. Upon completion of wartime military service such individuals are entitled to claim the bonus.

The law also encourages New York residents to return to the state after completion of wartime military service and continue there in government service. By the time a New York resident has entered the armed services, the State has already invested heavily in his or her education, health and welfare. The residents

(Footnote Continued)
this court noted that the Alaska contributions were "undefined." 457 U.S. at 61. In *Hooper*, the retroactive reward was not based on service in time of war as a New Mexico resident, but residency during an arbitrary period which had no relationship to when the veteran served. Here, however, the New York period is carefully defined and rationally based on service in time of war as a resident. Furthermore, as Justice Brennan noted in his concurring opinion in *Zobel* this Court's statement addressed only *durational* residency requirements. *Zobel*, 457 U.S. at 68 (Brennan, J., concurring). All the Justices who concurred in *Zobel* agreed that rewarding past public service was legitimate when not linked to length of residence. *Id.* at 70-71; *id.* at 72-73 (O'Connor, J., concurring). Thus, even if the awards in the New York provisions were deemed to be retroactive, they are constitutional.

who enter the armed services presumably have acquired knowledge of the local environment – its governmental workings, its people and their problems – which non-residents would not have been exposed to and would not possess. This knowledge and experience, when coupled with the valuable training the individual acquires while serving in the armed services, make the veteran who also has been a resident particularly attractive to public sector employers within the State. The twin attributes they possess make them more attractive as job prospects than either non-residents or non-veteran residents, even though New York believes the latter groups are also good prospects for governmental service. Consequently, these individuals generally may be regarded as among the best-suited for public sector employment within the State.[20]

Because residents who are veterans constitute a particularly valuable group of public servants, the veteran preference scheme serves to encourage them to return to the State and lend their acquired skills to the service of the people of the State. Thus, the New York veteran preference scheme rationally facilitates the efficient use of human resources for the benefit of residents of the State.

III. ARTICLE V, § 6 DOES NOT VIOLATE PLAINTIFFS' RIGHT TO TRAVEL

The court of appeals also held "that New York's veteran preference scheme burdens the right to travel and may be upheld only if necessary to promote a compelling state interest." (A30).

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[20] The purpose that is served here is quite unlike the reward for past contributions to established residents which this Court found not to be a legitimate purpose in *Zobel* and *Hooper*. *See Hooper*, 105 S. Ct. at 2868-9. Both the Alaska and New Mexico statutes examined in those cases involved pure rewards for prior service without an expectation of any direct future benefit to those states. Rather than seeking simply to "take care of its 'own,'" *id.*, New York has identified attributes in its prior residents which could be of great direct benefit to the State in the provision of governmental services to the public.

Having already found the legitimate purposes of the scheme to be not rationally related to the distinction the law draws between time-of-induction New York residents and non-residents, the court concluded that the scheme also failed the compelling state interest test. (A30). Accordingly, it concluded, contrary to the determination of the district court, "that the New York scheme impermissibly infringes the right to travel and, for this reason as well, must be declared unconstitutional." (A31).

This Court has made clear in *Zobel* that "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." 457 U.S. at 60 n.6. Not every law that implicates the right to travel is subjected to heightened scrutiny. *See, e.g., Jones v. Helms*, 452 U.S. at 426. Indeed, although the concurring opinion by Justice Brennan in *Zobel* states that "where the 'right to travel' is involved, [this Court's] cases leave no doubt that it will trigger intensified equal protection scrutiny," 457 U.S. at 66 n.1, in that case he analyzed the right to travel claim under a rational basis test. 457 U.S. at 70. As shown above, art. V, § 6 is consistent with the equal protection clause. See pp. 20-30, *ante*. Even if plaintiffs' right to travel claim is viewed separately, for the reasons detailed below, the court of appeals erred.

A. Article V, § 6 Does Not Implicate Plaintiffs' Right to Travel

The court of appeals' conclusion that New York's veteran preference scheme unconstitutionally violates plaintiffs' right to travel rests on its view that the scheme distinguishes between time-of-entrance New York residents and non-residents. (*See* A30, A21 and pp. 27-28, *ante*). This view focuses, incorrectly, on the wrong time, the time of application for civil service employment. The appropriate time to determine whether the state is restricting the right to travel is at the time eligibility for the benefit is *determined* (here, entry into the armed forces) rather than when the benefit is *distributed* (here, the time of appointment to civil service employment). At the time eligibility is determined, of course, there is no restriction at all on the right to travel. Anyone is free

to move to New York to take advantage of this benefit by entering the armed services as a New Yorker. *Martinez*, 103 S. Ct. at 1842-43. Article V, § 6 simply requires establishment of a bona fide residence, without the necessity of a waiting period, as in the lower tuition rate statutes upheld by this Court. Thus, New York law does not infringe plaintiffs' right to travel at the relevant time—the time eligibility for the credit is initially determined.

B. The Modest Benefits Accorded New York Residents at the Time of Their Induction into the Armed Services Do Not Unreasonably Burden the Right to Travel

As New York's veteran preference scheme operates to achieve its intended purpose to encourage residents to enter military service, it also serves to foster interstate travel. It is a promise which beckons non-residents to establish residence in New York and enter the armed services as New Yorkers. The New York scheme places newly established residents on precisely the same footing as long-term residents of the State and perhaps offers the new resident advantages that are simply unavailable in his or her former state. This is precisely the "healthy form of rivalry" which Justice Brennan applauded in *Zobel*. 457 U.S. at 68.

Assuming that the court of appeals could properly evaluate the New York veteran preference scheme as of the time the benefit is claimed, it incorrectly concluded that the benefit unreasonably burdens the right to travel. The court of appeals recognized that not every state law that has an effect on travel is sufficient to raise an issue of constitutional dimension. (See A27). It properly concluded that

> a statute implicates the constitutional right to travel when it actually deters such travel, . . . or when impedance of travel is its primary objective, . . . or when it uses " 'any classification which serves to *penalize* the exercise of that right.' "

(A28) (citations omitted) (emphasis in original). The court concluded that the distinction the New York veteran preference scheme draws between time-of-entrance residents and non-residents constitutes a penalty for veterans who were not residents of New York at the time they entered the armed forces.

The court of appeals recognized that the benefit which the law confers is modest; nevertheless, it rejected the three-judge court's finding in *August* that the scheme conferred so limited a benefit that it could not realistically be held to penalize the right to travel. (A19). The benefit *is* quite modest. It does not automatically entitle eligible veterans to jobs ahead of non-eligible veterans. It simply accords eligible veterans an *opportunity*, which may be exercised only once, to be hired sooner than others. Eligible individuals gain no preference over non-eligible individuals who obtain examination scores that are five or more percentage points higher. Moreover, the right to travel for veterans who are not eligible for the benefit is not *penalized* for such individuals. They remain in precisely the same position as the vast majority of New York residents who compete for civil service employment, or as non-New Yorkers contemplating a move to New York to work for government there. Like other non-eligible individuals, veterans who were not residents of New York at the time of induction could through personal effort obtain examination scores that were sufficiently high to overcome the few percentage points that eligible New York veterans are entitled to claim.

Although a successful claim of unconstitutional denial of the right to travel may not be conditioned on proof that the grievant was actually deterred from exercise of the right to travel, *see Memorial Hospital v. Maricopa County*, 415 U.S. at 258, the facts of this case belie any claim that New York's veteran preference laws either constituted a significant penalty or actually discouraged either of the plaintiffs in the exercise of their right to travel and become New York residents. Mr. Soto-Lopez entered the United States Army in 1961, was discharged in 1963 and became a New York resident in 1965. He remained a New York resident for over 15 years before taking a civil service examination and claiming a preference under New York Civil Service Law

§ 85. (See A4). Similarly, Mr. Baez-Hernandez was inducted into the United States Army in 1958, was discharged in 1968 and became a New York resident in 1968. More than twelve years passed before he took a civil service examination and claimed a preference on the basis of his status as a veteran who served during time of war. (See *Id*).

Although the court of appeals acknowledged the limited scope the benefit New York accords time-of-entrance residents, it observed that "the annual amounts at issue in *Zobel* were far less significant than the potential deprivations . . ., *i.e.* a job and possible launching of a career," (A19) that were under consideration in this case. Of course, the benefit which this Court reviewed in *Zobel* is fundamentally different from that involved in this case. Unlike *Zobel*, the New York veteran preference scheme does not create "an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the state." *Zobel*, 457 U.S. at 59. In *Zobel* and in *Hooper*, the size of the benefits accumulated over time and their negative effects on others increased or continued unabated.[21] Here, the

[21] In *Zobel*, the economic disparity between long-term residents and new residents was considerable. In the first year the Alaska statute was in effect, a new resident of less than a year was eligible for one dividend unit, or fifty dollars; a resident since statehood was eligible for 21 units (one for each year of residency), or $1,050. This $1,000 per year disparity between these two classes of residents would continue forever. After twenty years, however, assuming the same amount per unit, a new resident of less than a year would still be eligible for only one dividend unit or fifty dollars; a resident since statehood would now receive 41 units or $2,050. Thus, every year a new underclass of residents would be created, each less equal than the preceding class of new residents.

In *Hooper*, after twenty years, a long-term resident of New Mexico who was living in the state on or before May 5, 1976, would have received tax exemptions worth $5,000. Thus his benefit would continue long after he had readjusted to civilian life. Veterans, like Hooper, who subsequently took up residence in the state, however, would have received nothing.

Here, a New York resident at time of entry into the armed forces may use his credit only once on initial application (with a further, smaller one-time credit on a first promotion). In all other respects, persons who did not move to New York to take advantage of the veteran preference credit when they entered the armed forces are treated the same.

adverse impact of the scheme on non-bonus recipients dissipates over time. (See A29).

Finally, although it was not endorsed by the court of appeals, plaintiffs' further claim that if veterans were residents of other states in which they qualified for a veteran preference, they are forced to forfeit that benefit to travel to New York. Motion to Dismiss or Affirm at 9. This amounts to an argument that veterans have a constitutional right to engage in double-dipping. Plaintiffs do not contend that they actually forfeited such benefits.[22] In any event, this argument proves too much. Under plaintiffs' approach, the failure of a second state to provide the same benefits to its residents as the first would *always* deter the right to travel.

[22] They are simply ineligible at present to claim such benefits because neither one is "a bona fide resident of Puerto Rico." P.R. Laws Ann. tit. 29, § 812 (Equity 1982 Supp.). If they resumed residence in Puerto Rico they would, of course, be eligible for preference credit in the Puerto Rico civil service. *Id.* at § 814 A.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the court below.

Dated: New York, New York
September 6, 1985

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STATUTORY APPENDIX

STATUTORY APPENDIX

SELECTED NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS AWARDING VETERAN PREFERENCES

	Page
Act of May 12, 1921, ch. 702, 1921 N.Y. Laws 2483	S-1
N.Y. Const. art. V, § 6 (1929) (effective Jan. 1, 1930) (amended 1945)	S-3
N.Y. Const. art. V, § 6 (1945) (effective Jan. 1, 1946) (amended 1949)	S-4
N.Y. Const. art. V, § 6 (1949) (effective Jan. 1, 1950) (amended 1964)	S-5
N.Y. Const. art. V, § 6 (1964) (effective Jan. 1, 1965)	S-7
N.Y. Civ. Serv. Law § 85(1) (McKinney 1983 & Supp. 1984-85)	S-8

Act of May 12, 1921,
ch. 702, 1921 N.Y. Laws 2483

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter fifteen of the laws of nineteen hundred and nine, entitled "An act in relation to the civil service of the state of New York and the civil divisions and cities thereof, constituting chapter seven of the consolidated laws," is hereby amended by inserting therein a new section, to follow section twenty-one-a, to be section twenty-one b, to read as follows:

§ 21-b. Preference to veterans.

(a) The word "veteran," when used in this section, shall mean and include any person, male or female, who, being a resident of this state at the time of induction into the service, served in the army, navy or marine corps of the United States within the period of actual warfare in time of war, or who, being a resident of this state and a citizen of the United States at the time of induction into such service, served within the period of actual warfare in the world war in the military or naval service of any nation associated with the United States in such war and has received an honorable discharge or relief from such service; but shall not include any person who refused so to serve after a final decision of the proper military authorities requiring such service.

(b) The phrase "disabled veteran," when used in this section, shall mean and include any veteran who has lost, or been totally disabled in, a hand, foot, arms, leg, shoulder, hip, eye or ear, or who sustained injuries that subsequently proved the direct cause of such loss or total disability or who sustained injury to any organ or member sufficient to destroy or permanently impair the function thereof or who suffered injury or illness directly causing a permanent and serious impairment of health; and who has received therefor a disability rating from the government of the United States or from any such associated nation. The state department of health shall determine and certify to such disability; except that in the service of the city of New York the municipal civil service commission shall determine such disability.

(c) Every disabled veteran shall be entitled to preference in original appointment without regard to his standing on any list from which such appointment may be made, to all competitive positions in the civil service of the state and the civil divisions thereof, provided his qualifications and fitness shall have been ascertained as provided in this chapter and the rules and regulations made in pursuance thereof; and a person so preferred shall not be disqualified from holding any position in such service on account of his age or disability, provided such age or disability does not render him incompetent to perform the duties of the position.

(d) Every veteran shall be entitled to preference in original appointment to all competitive positions in the civil service of the state and the civil divisions thereof over all other persons eligible for such appointment and standing on the list therefor with a rating equal to that of such veteran. Every veteran shall be entitled to preference in appointment to all positions classified in the labor class in cities without regard to their standing on any such list, provided, however, that disabled veterans shall be preferred over all others on such list.

(e) In all examinations for original appointment to any competitive position in the state service or in the civil divisions thereof, veterans shall receive additional credits for personal merit, as shown by military training and experience. The civil service commission, by proper rule or regulation, shall fix the comparative ratings to be given to veterans. The weight to be given to personal merit in no case shall exceed twenty per centum of the total weights of the examination.

§ 2. This act shall take effect immediately.

N.Y. Const. art. V, § 6 (1929)
(effective Jan. 1, 1930) (amended 1945)

Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, any honorably discharged soldiers, sailors, marines or nurses of the army, navy or marine corps of the United States disabled in the actual performance of duty in any war, to an extent recognized by the United States Veterans' Bureau, who are citizens and residents of this state and were at the time of their entrance into the military or naval service of the United States, and whose disability exists at the time of his or her application for such appointment or promotion, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

N.Y. Const. art. V, § 6 (1945 (effective Jan. 1, 1946) (amended 1949)

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his or her entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, and who was disabled therein to an extent certified by the United States veterans administration, and whose disability is certified by the United States veterans administration to be in existence at the time of his or her application for appointment or promotion, shall be entitled to preference and shall be appointed or promoted before any other appointments or promotions are made, without regard to his or her standing on any list from which such appointment or promotion may be made. Until December thirty-first, nineteen hundred fifty, but in no event for a period less than five years next following the honorable discharge or release under honorable circumstances of a member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his or her entrance into the armed forces of the United States, he or she shall be entitled, after such disabled members of the armed forces shall have been first preferred, to similar preference in appointment and promotion. Upon the abolition or elimination of positions in the civil service, to which the foregoing preferences are applicable, any such member of the armed forces shall be entitled to preference in the retention of any position held by him or her, in inverse order of the preference as provided in this section. Laws shall be enacted to provide for the enforcement of this section.

N.Y. Const. art. V, § 6 (1949) (effective Jan. 1, 1950) (amended 1964)

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive; [provided, however, that until January first, nineteen hundred fifty-one, any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his or her entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to the preferences granted by the provisions of former section six of this article, which shall continue in effect until such date, notwithstanding its repeal by the concurrent resolution of the senate and assembly adding this section,] and provided, further, that on and after such date, any such member shall, in lieu of such preference, be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his or her disability is certified by such administration to be in existence at the time of his or her application for appointment or promotion, he or she shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he or she has qualified in an examination and shall be granted only at the time of establishment of an eligible list, except that eligible lists in existence on January first, nineteen hundred fifty-one shall be revised by adding the applicable credits provided herein for such members of the armed forces. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed

the additional credit granted by this section. The legislature may provide by law for preference in retention of such members in case of the abolition or elimination of positions in the civil service. Laws shall be enacted to provide for the enforcement of this section.

N.Y. Const. art. V, § 6
(1964) (effective Jan. 1, 1965):

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

N.Y. Civ. Serv. Law § 85 (1)
(McKinney 1983 and Supp. 1984-85)

1. Definitions.

(a) The terms "veteran" and "non-disabled veteran" mean a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion or at the time of retention, as the case may be.

(b) The term "disabled veteran" means a veteran who is certified by the United States veterans' administration or a military department as entitled to receive disability payments upon the certification of such veterans' administration or a military department for a disability incurred by him in time of war and in existence at the time of application for appointment or promotion or at the time of retention, as the case may be. Such disability shall be deemed to be in existence at the time of application for appointment or promotion or at the time of retention, as the case may be, if the certificate of such veterans' administration shall state affirmatively that such veteran has been examined by a medical officer of such veterans' administration on a date within one year of either the date of filing application for competitive examination for original appointment or promotion or the date of the original appointment or promotion or the date of the establishment of the resulting eligible list or within one year of the time of retention, as the case may be; that at the time of such examination the war-incurred disability described in such certificate was found to exist; and that such disability is rated at ten per centum or more. Such disability shall also be deemed to be in existence at such time if the certificate of such veterans' administration shall state affirmatively that a permanent stablized condition of disability exists to an extent of ten per centum or more, notwithstanding the fact such veteran administration

within one year of either the time of application for appointment or promotion or the date of application for appointment or promotion or the date of filing application for competitive examination for original appointment or promotion, or within one year of the time of retention, as the case may be. The term "disabled veteran" shall also mean:

(1) A veteran who served in world war I, who continued to serve in the armed forces of the United States after the eleventh day of November, nineteen hundred eighteen, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the second day of July, nineteen hundred twenty-one.

(2) A veteran who served in world war II, who continued to serve in the armed forces of the United States after the second day of September, nineteen hundred forty-five, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the date that world war II is declared terminated.

(3) A veteran who served during hostilities participated in by the military forces of the United States subsequent to June twenty-fifth, nineteen hundred fifty, and who continued to serve in the armed forces of the United States after the twenty-seventh day of July, nineteen hundred fifty-three, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the date that world war II is declared terminated.

(c)The term "time of war" shall include the following wars for the periods herein set forth:

(1) World war I, from the sixth day of April, nineteen hundred seventeen, to and including the eleventh day of November, nineteen hundred eighteen.

(2) World war II, from the seventh day of December, nineteen hundred forty-one, to and including the second day of September, nineteen hundred forty-five.

(3) Hostilities participated in by the military forces of the United States, from the twenty-sixth day of June, nineteen hundred fifty, to and including the thirty-first day of January, nineteen hundred fifty-five.

(4) Hostilities participated in by the military forces of the United States, from the first day of January, nineteen hundred sixty-three to the seventh day of May, nineteen hundred seventy-five.

JOINT

APPENDIX

No. 84-1803 (A)

Supreme Court, U.S.
FILED
OCT 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellant,

—against—

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

JUAN CARTAGENA, ESQ.
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BEST AVAILABLE COPY

41pp

INDEX

Page

1. Relevant docket entries in the courts below

Docket sheet in district court JA-1

Docket sheet in court of appeals JA-4

2. Relevant pleadings, jury instructions, findings, conclusions and opinions

Complaint, filed February 22, 1983 ..... JA-6

Answer, filed May 16, 1983 ..... JA-14

Endorsed memorandum of the United States District Court for the Southern District of New York in *Soto–Lopez v. New York City Civil Service Commission*, No. 83-Civ. 1370 (RO) (S.D.N.Y. Mar. 8, 1984) (reproduced in appendix to jurisdictional statement at A-37)

Opinion of the United States Court of Appeals for the Second Circuit in *Soto-Lopez v. New York City Civil Service Commission*, No. 85-7325 (2d Cir. Feb. 15, 1985) (reproduced in appendix to jurisdictional statement at A-1)

3. Judgment, order or decision in question

Final judgment of the United States District Court for the Southern District of New York in *Soto-Lopez v. New York City Civil Service Commission*, No. 83-Civ. 1370 (RO) (S.D.N.Y. Mar. 14, 1984) (reproduced in appendix to jurisdictional statement at A-38)

Page

4. Other parts of the record to which the parties wish to direct the Court's attention

Plaintiffs' rule 3(g) statement in support of notice of motion JA-19

Affidavit of Eliezer Baez-Hernandez in support of notice of motion JA-23

Affidavit of Eduardo Soto-Lopez in support of notice of motion JA-25

Affidavit of Brenda S. Spears in opposition to notice of motion (exhibits omitted) JA-27

Defendants' notice of cross-motion for summary judgment JA-31

Affidavit of Beth G. Schwartz in opposition to notice of motion and in support of notice of cross-motion JA-33

Defendants' rule 3(g) statement in support of notice of cross-motion JA-37

83 Civ. 1370 (RO)
SOTO-LOPEZ V. N.Y.C. CIVIL SERVICE COMM.

DOCKET SHEET

DATE	NR.	PROCEEDINGS
2-22-83	1	Fld Complaint-Issued summons and Notice purs. to 28; 636 c
3-10-83	2	Filed NOTICE OF ASSIGNMENT to Owen, J. m/n
3-9-83	*3	Filed summons with marshals return Via Certified Mail #099016, served: Juan U. Ortiz on 2-28-83 N.Y.C. Civil Service Comm. on 3-1-83 #099014 Mark Lebow on 3-1-83 #099015 N.Y.C. Dept. of Personnel on 2-28-83 #099017
3-22-83	4	Filed LETTER by The City of N.Y. Law Dept. Re: defts' time to move or answer with respect to the complt. be ext. until 4-20-83. So ordered Owen, J.
5-12-83	5	Filed pltffs' First Interrogs. to defts.
5-16-83	6	Filed ANSWER for defts. (FS)
5-19-83	7	Filed defts' AFFDVT. & NOTICE OF MOTION dismissing this action for failure to join the State of N.Y. as a deft. or requiring pltffs. to join the State of N.Y. as a party deft. to this action. Ret: Rules 19 & 21 FRCP Ret: 5-27-83
5-19-83	8	Filed defts' MEMORANDUM OF LAW.
6-2-83	9	Filed Pltffs' MEMORANDUM OF LAW in opposition to defts' Motion to dismiss for failure to join the State of N.Y. as deft.
10-24-83	10	Filed pltff's affidavit & Notice of Motion for an order granting summary Judgment Ret: 10-20-83 at 9:30 am.
10-24-83	11	Filed pltffs' memorandum of law in support of Motion for summary Judgment,

11-2-83	12	Filed ENDORSED MEMORANDUM, Given the foregoing, the City's Motion is denied. So Ordered. Owen, J.
1-5-84	13	Filed stip and order that: the State of N.Y. by Robert Abrams appearing pro se, shall be permitted to intervene in this action as a deft. pltffs' motion for sum. judgment is adj. until 1-20-84 etc. as indicated. So ordered Owen, J.
1-10-84	14	Filed AFFDVT. in opposition by Brenda S. Spears for Intervenor, Pro se.
1-10-84	15	Filed Intervenor's MEMORANDUM OF LAW in opposition to pltffs' Motion for summary Judgt.
1-16-84	16	Filed STATEMENT pur. to Rule 3(g) for defts.
1-16-84	17	Filed City defts NOTICE OF MOTION pur. to Rule 56(b) FRCP granting summary judgt in favor of defts N.Y. Civil Service Comm., N.Y. City Dept. of Personnel, Mark Lebow, & Juan Ortiz. Ret: 1-20-84
1-16-84	18	Filed AFFDVT. in opposition to pltffs' Motion for summary judgt. & in support of Cross-Motion by Beth G. Schwartz.
1-16-84	19	Filed MEMORANDUM OF LAW in support of City defts' Cross-Motion for summary judgt.
1-18-84	20	Filed plaintiffs Reply Memorandum of Law in support of motion for summary judgment and in opposition to defendants cross-motion for summary judgment.
3-12-84	—	Filed ENDORSED MEMORANDUM on document #17, The motion for summary judgt. dismissing the complt. is granted. So ordered Owen, J. m/n

3-13-84	—	Filed MEMO ENDORSED on Document #10, The motion is denied. See Memorandum end. on the Cross Motion. So ordered Owen, J., m/n
3-14-84	21	Filed FINAL JUDGT. Ordered that the complt is dismissed. - Clerk. m/n
4-4-84	22	Filed pltffs' Jorge Batista, Robert L. Becker's NOTICE OF APPEAL from final judgt. ent. 3-14-84. Mailed copies to Frederick A.O. Schwarz Jr. 100 Church St., N.Y.C. 10007 and Robert Abrams, Esq. 2 World Tr. Center N.Y.C. 10047
4-5-84	—	Forwarded copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & doc entries to Court of Appeals.
5-4-84	23	Filed Notice of certification of record on appeal to the USCA for the Second Circuit.
3-11-85	24	Filed true copy of USCA MANDATE with Opinion, Ordered that the judg. of the said Dist. Court is reversed and the action is remanded to the for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees. EOD 3-11-85 copy sent to chambers.
4-25-85	25	Filed PROPOSED ORDER, Ordered that this Court will stay all further proceedings for a period of 30 days on condition that the intervenor seek a stay in the Second Circuit etc. So ordered Owen, J.
7-17-85		Filed ORDER, Ordered that "City defts" are permanently enjoined from enforcing the provision of Article V, §6 of the N.Y. State Constitution etc. as indicated. The Court reserves decision on pltffs' entitlement to back & all other relief as may be just and proper including attny's fees. Owen, J.
9-12-85	27	Filed Notice of Certification of record on appeal to the USCA for the Second Circuit.

GENERAL DOCKET 08/13/85

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TITLE: SOTO LOPEZ V NYC
CIV SERV COMM
CASE TYPE: CV PRI
NDA: 04/04/84
DATE DOCKETED: 04/09/84

DKT: 84-7325
CALENDAR: 840038
FEE: PD

Origin: SNY
Division: NEWYORKC

Action Filed: 02/22/83

Nature of Suit: 3950

DC-Dkt: 83 CV 1370
DC-J: OWEN, RICHARD
DC Judgment Date: 03/14/84

FORMS, RECORD AND BRIEFING ACTIVITY

Local Rules Forms: 4/9/84
Sufficient Record on Appeal: 05/04/84
Supplemental Record(s) on Appeal:
Last Appellant's Brief: 05/11/84
Last Appellee's Brief: 05/23/84
Last Reply Brief:

ARGUMENT, SUBMISSION, DECISION AND MANDATE ACTIVITY

Argument Date: 09/19/84
Submission Date:
Judge 1: OAKES, JAMES L. (Concurring)
Judge 2: KEARSE, AMALYA L
Judge 3: PRATT, GEORGE C.

Writing Judge: KEARSE, AMALYA L

Decision Type: REV. RMD
JLO CONCURS IN SEP. OPINION

Decision Method: PUB,SIGN,OPN
Decision Date: 02/15/85
Mandate Issued: 03/08/85

Citation:

Reopened:

REHEARING AND SUPREME COURT ACTIVITY

Petition for Rehearing Filed:
Petition for Rehearing Decision:
Decision Date:
Mandate Receipt: 03/12/85
Final SC Disposition:

Cert. Filed: 05/15/85
Cert. Decision: G
Decision Date: 07/01/85
ROA Receipt:
Final SC Disp Date:

5-2-85	Notice of filing an appeal in the Supreme Court filed (S.C. #84-1803)
7-3-85	Certified copy of order by Supreme Court noting probable jurisdiction filed
9-16-85	Original proceedings and district Court record transmitted to Supreme Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

COMPLAINT

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel

Civ. 83
Civ. 1370

Defendants
X

PRELIMINARY STATEMENT

1. Plaintiffs bring this action for declaratory and equitable relief pursuant to 42 U.S.C. §1983 to protect their rights to equal protection of the laws and their right to travel guaranteed by the Constitution of the United States. They seek a declaratory judgment that 6, Article V of the Constitution of the State of New York and §85(1)(a) of the New York Civil Service Laws insofar as they require veterans to be residents of the State of New York at the time of entering the armed forces in order to obtain the veterans' preference points, are in violation of the Constitution of the United States. They also seek an injunction against defendants prohibiting the implementation of those provisions.

JURISDICTIONAL STATEMENT

2. Jurisdiction of this Court is invoked pursuant to and in accordance with the provisions of 28 U.S.C. 1343(3) and (4).

This action is brought under the 42 U.S.C. §1983 and arises under the Fourteenth Amendment to the United States Constitution. Declaratory relief is sought under 28 U.S.C. §§2201 and 2202. Injunctive relief is authorized under F.R.C.P. 65.

PARTIES

3. Plaintiff Eduardo Soto-Lopez is a citizen of the United States of New York, residing at 96 Hort Street, Apt. 3D, Brooklyn, New York.

4. Plaintiff, Eliezer Baez-Hernandez is a citizen of the United States, residing at 2255 Bronxwood Avenue, Bronx, New York.

5. The defendant, New York City Civil Service Commission is a city governmental body in charge of the enforcement of the provisions of the New York Civil Service Law in the city of New York with its offices at 42 Broadway, New York, New York 10004.

6. The defendant, New York City Department of Personnel is a governmental body responsible for the administration of the provision of the New York State Civil Service Laws in regard to positions in the classified service of the city of New York, with its official office at 220 Church Street, New York, New York 10013. It grades and classifies positions in the Civil Service and establishes, promulgates, and certifies eligible lists.

7. The defendant, Mark D. Lebow, as Chairman of the New York City Civil Service Commission is responsible for the discharge of the duties and functions of the New York City Civil Service Commission.

8. The defendant, Juan U. Ortiz, as Director of the New York City Department of Personnel is responsible for the discharge of the duties and functions of the Department.

STATUTORY BACKGROUND

9. The Constitution of the State of New York, Article V, §6 provides that in order to obtain the veterans' additional points

credits in a competitive examination, (five points for original appointments and two and one-half points for promotion in the case of non-disabled veterans and ten points for original appointment and five points for promotion in the case of those receiving disability payments) the veteran has to meet the following requirements: (a) service in time of war; (b) is a citizen and resident of the State of New York; (c) *was a resident of the State of New York at the time of his entrance into the armed forces*; and (d) was honorably discharged or released under honorable circumstances. and (d) was honorably discharged or released under honorable circumstances.

10. The New York Civil Service Law, Section 85 provides for the additional credit allowed veterans in competitive examination. Section 85(1)(a) and (b) defines "veteran" or "non-disabled veteran" as a member of the armed forces of the United States; who served in time of war, who was honorably discharged or released under honorable circumstances, *who was a resident of the State of New York at the time of entrance into the armed forces*, and who is a citizen and resident of New York at the time of application for appointment, promotion or retention. A "disabled veteran" is defined as a person who is certified by the Veterans Administration as entitled to receive disability payments.

11. Section 85(2)(a), of the New York Civil Service Law provides for the same number of additional points in §6, Article V of the Constitution of New York as set forth in paragraph 8 herein.

STATEMENT OF FACTS

12. Plaintiff, Eduardo Soto-Lopez entered the United States Army on November 7, 1961 and served until October 24, 1963.

13. On October 24, 1963 plaintiff, Soto-Lopez, was honorably discharged from active service and entered reserve status from which he was honorably discharged on October 31, 1967.

14. At the time plaintiff Soto-Lopez entered the armed forces, he was a citizen of the United States and a resident of the Commonwealth of Puerto Rico.

15. In August, 1965, plaintiff Soto-Lopez became a resident of the State of New York.

16. In 1980, plaintiff Soto-Lopez took the New York City civil service competitive examination number 5003 for the position of housing caretaker and obtained a score of 88.00.

17. At that time, plaintiff Soto-Lopez was awarded 5 points as additional credit pursuant to the New York Civil Service Law §85(2)(a) which was added to his score making it a final score of 93.00.

18. On or about December 15, 1982, plaintiff Soto-Lopez was called for an interview for the housing caretaker position and took the medical examination.

19. On or about December 20, 1982, plaintiff Soto-Lopez was called for the final interview and at that time in view of his residency in the Commonwealth of Puerto Rico at the time he entered the armed forces, the additional five points were cancelled and his eligibility list number was dropped to the point where the defendants rejected him for the position.

20. The defendants acting under the provisions of §6, Article V of the Constitution of the State of New York and §85(1)(a) of the New York Civil Service Laws determined that plaintiff was not eligible for the veterans preference points since plaintiff did not meet the residency requirement of the law.

21. Plaintiff, Eliezer Baez-Hernandez entered the United States Army on September 2, 1958 and served until August 23, 1960

22. On August 23, 1960, plaintiff Baez-Hernandez was honorably discharged from active service and entered the reserve status.

23. At the time plaintiff Baez-Hernandez entered service, he was a citizen of the United States and a resident of the Commonwealth of Puerto Rico.

24. In July of 1968, plaintiff Baez-Hernandez and his family became residents of the State of New York.

25. In 1970, plaintiff Baez-Hernandez was called to active duty and served for 15 days at Fort Drum in Watertown, New York.

26. Plaintiff Baez-Hernandez was honorably discharged from this second period of active service.

27. While on active duty at Fort Drum, plaintiff Baez-Hernandez was injured and the Veterans Administration determined on October 10, 1973, that said injury had caused a 10% permanent disability to plaintiff and that he was entitled to receive disability payments.

28. On or about June 20, 1980, plaintiff Baez-Hernandez took the New York City civil service competitive examination number 8057 for the position of Human Resources Specialist and obtained a score of 77.30.

29. At that time, plaintiff Baez-Hernandez was awarded a 10 points additional credit pursuant to the New York Civil Service Law §85(2)(a) which was added to plaintiff's final earned rating.

30. Consequently, plaintiff Baez-Hernandez received an appointment for a position of Human Resources Specialist on or about June 1, 1981.

31. Two days later, the defendants cancelled the 10 points additional credit given to plaintiff Baez-Hernandez and thereafter, rejected plaintiff for the position already offered.

32. The defendants, applying Section 6, Article V of the Constitution of the State of New York and Section 85(1)(a) and (b) of the New York Civil Service Laws determined that plaintiff Baez-Hernandez was not a "veteran" within the meaning of the law for purposes of granting the veterans preference points since plaintiff had entered the Army of the United States when he was not a resident of New York State.

33. Thereafter, plaintiff Baez-Hernandez took the New York City civil service competitive examination number 8144 for the position of O.C. Research Assistant some time in 1981 and obtained a score of 75.30.

34. Again, a 10 point additional credit was added to plaintiff's final earned rating pursuant to §85(2) New York Civil Service Laws.

35. Before receiving any appointment for the position of O.C. Research Assistant, plaintiff Baez-Hernandez took the New York City Civil Service Competitive Examination number 0153 for Assistant Accountant and obtained a score of 76.052.

36. Plaintiff was granted a 10 point additional credit which was added to his final earned rating.

37. On or about March 31, 1982, the New York City Department of Personnel appointed plaintiff Baez-Hernandez for a position as Assistant Accountant and immediately afterwards cancelled the appointment for the same reasons that plaintiff was not eligible under the §85(1) of the New York Civil Service Laws as stated in paragraph 32 above.

38. On September 21, 1982, plaintiff received an appointment for O.C. Research Assistant with the Department of Environmental Protection effective October 4, 1982 by the New York City Department of Personnel.

39. The defendants again, acting under the provisions of §85(1)(a) of the New York Civil Service Laws, determined that plaintiff Baez-Hernandez was not eligible for the veterans preference points for the same reasons stated in paragraph 32 and cancelled the appointment for the position of O.C. Research Assistant offered to plaintiff.

40. Each time that plaintiff's appointments were cancelled and the additional 10 points deducted, his list numbers were changed to numbers so far down on the elibility list that he still has not been reached for appointment.

STATEMENT OF CLAIMS

41. In acting to deny plaintiffs the veterans preference points and consequently rejecting them for the positions in the manner described in paragraphs 12 through 40 above, defendants approved, utilized and applied to plaintiffs §85(1)(a) of the New York Civil Service Laws and §6 Article V of the Constitution of New York.

42. The provisions of Section 6, Article V of the Constitution of the State of New York and §85(1)(a) of the New York Civil Service Laws requiring that plaintiffs be residents of the State of New York at the time of entering the U.S. Armed Forces for purposes of obtaining the benefits of the veterans preference points are invalid as contrary to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because such provisions create a permanent classification within the war veterans of the United States making two classes of veterans; those who were residents of the State of New York and those who were not at the time of entry into the Armed Forces.

43. In addition, these provisions are an unconstitutional interference with plaintiffs' right to travel secured by the Constitution of the United States.

44. Each of the defendants has acted under color of law in depriving the plaintiffs of their rights under the Constitution of the United States causing plaintiffs damages for which, pursuant to 42 U.S.C. §1983, the defendants are liable.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff pray:

a) That a declaratory judgment be entered finding that Section 6, Article V of the Constitution of New York and Section 85(1)(a) of the New York Civil Service Laws and denying the veterans preference points to those veterans who were not residents of the State of New York at the time of entering the armed forces of the United States, are violative of the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution and the right to travel guaranteed by the United States Constitution.

b) That this Court enter a permanent injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendants from utilizing and enforcing the provisions of Section 6, Article V of the Constitution of New York and Section 85(1)(a) and (b), New York Civil Service Laws insofar as they require the veterans to be residents of the State of New York at the time of entering the Armed Forces.

c) That judgment be entered ordering the defendants to reinstate the 5 additional points to plaintiff Soto-Lopez' examination score and the 10 additional points to all of plaintiff Baez-Hernandez' New York Civil Service Competitive Examination scores; to change plaintiffs' numbers on the eligibility lists accordingly and to offer plaintiffs positions immediately with back pay and retroactive seniority.

d) That judgment be entered for costs, disbursements and reasonable attorneys' fees for plaintiffs' attorneys against defendants pursuant to 42 U.S.C. 1988.

e) That judgment be entered for any such other further relief which the court would deem necessary and proper.

DATED: New York, New York
January , 1983

ROBERT L. BECKER
KENNETH KIMERLING

CASSIE DE SILVESTORE
Of Counsel

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and Education Fund, Inc.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel.

ANSWER

83 Civ. 1370 (RO)

Defendants
X

Defendants, by their attorney, Frederick A.O. Schwarz, Jr. Corporation Counsel, as and for an answer to the complaint, allege as follows:

1. Deny the allegations of paragraphs "1" and "2".

2. Deny knowledge and information sufficient to form a belief as to the truth of the allegations in paragraphs "3" and "4" except admit that defendant Department of Personnel records show that plaintiff Eliezer Baez-Hernandez resides at 2255 Bronxwood Avenue, Bronx, New York.

3. Deny the allegations of paragraph "5" and affirmatively state that the offices of the New York City Civil Service Commission are located at 32 Broadway, New York, New York 10004 and respectfully refer the Court to New York City Charter section 812 for a description of the functions of the New York City Civil Service Commission.

4. Deny the allegations of paragraph "6" except admit that the New York City Department of Personnel has offices located at 220 Church Street, New York, New York 10013 and respectfully refer the Court to New York City Charter Chapter 35 for a description of the functions of the Department of Personnel.

5. Deny the allegations of paragraph "7" except admit that Mark D. Lebow is the Chairman of the New York City Civil Service Commission and respectfully refer the Court to New York City Charter section 812 for a description of his powers and duties.

6. Deny the allegations of paragraph "8" except admit that Juan U. Ortiz is the Director of the New York City Department of Personnel and respectfully refer the Court of New York City Charter section 813 for a description of his powers and duties.

7. Deny the allegations of paragraphs "9", "10", and "11" and respectfully refer the Court of New York State Constitution Article V, section 6 and New York Civil Service Law Section 85 for their full text and import.

8. Deny the allegations of paragraph "16" except admit that plaintiff Soto-Lopez took examination number 5003 for the position of housing caretaker and obtained a score of 88.00.

10. Deny the allegations of paragraph "17" and affirmatively state that 5 points additional credit was added to plaintiff's score pending investigation after appointment of his entitlement to that credit pursuant to New York Civil Service Law section 85.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "18".

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "19" regarding plaintiff's interview and "rejection" and deny that defendants cancelled five points from plaintiff's score and that plaintiff's number on the eligibility list was dropped.

13. Deny the allegations of paragraph "20".

14. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "21", "22", "23", "24", "25", "26" and "27".

15. Admit the allegations in paragraph "28".

16. Deny the allegations of paragraph "29" and affirmatively state that 10 points additional credit was added to plaintiff's score pending investigation after appointment of his entitlement to that credit pursuant to New York City Service Law section 85.

17. Deny the allegations of paragraph "30".

18. Deny the allegations of paragraph "31" and "32" and affirmatively state that the records of defendant New York City Department of Personnel show that plaintiff was not selected for appointment at the New York City Human Resources Administration and that plaintiff was not entitled to veteran's credit under the New York State Constitution and the New York Civil Service Law.

19. Deny the allegations of paragraph "33" except admit that plaintiff Hernandez took examination number 8144 for the position of research assistant and obtained a score of 75.30.

20. Deny the allegations of paragraph "34" and affirmatively state that 10 points additional credit was added to plaintiff's score pending investigation after appointment of entitlement to that credit pursuant to New York Civil Law section 85.

21. Admit the allegations of paragraph "35".

22. Deny the allegations of paragraph "36" and affirmatively state that 10 points additional credit was added to plaintiff's score pending investigation after appointment of his entitlement to that credit pursuant to Civil Service Law section 85.

23. Deny the allegations of paragraph "37".

24. Deny the allegations in paragraph "38", "39" and "40" except admit that plaintiff Baez-Hernandez is not eligible for a

veteran's preference and that plaintiff has not been appointed to a civil service position from these eligibility lists.

25. Deny the allegations in paragraph "41", "42", "43" and "44".

As a First Affirmative Defense

The complaint fails to state facts upon which relief may be granted.

As a Second Affirmative Defense

The complaint fails to state facts upon which relief can be granted as against defendants New York City Civil Service Commission and Mark D. Lebow since these defendants took no part in the actions set forth in the complaint which plaintiffs allege entitle them to relief.

As a Third Affirmative Defense

Defendants New York City Service Commission and Mark D. Lebow are not proper parties to this proceeding since they took no part in the actions set forth in the complaint which plaintiffs allege entitle them to relief.

As a Fourth Affirmative Defense

Defendants have not violated any rights, privileges or immunities secured to plaintiffs by the Constitution or laws of the United States or the State of New York.

As a Fifth Affirmative Defense

Defendants acted at all times mentioned in the complaint in good faith and in accordance with all applicable laws and administrative regulations and without intent, either individually or in conspiracy with others to deprive plaintiffs of their civil or constitutional rights, privileges or immunities or any rights guaranteed by New York State Law.

As a Sixth Affirmative Defense

Defendants acted at all times mentioned in the complaint without negligence or malice, upon reasonable grounds and without breaching any duties owed to plaintiffs.

As a Seventh Affirmative Defense

Plaintiffs have failed to join as a party defendant in this action the Attorney General of the State of New York an indispensable party to these proceedings.

As an Eighth Affirmative Defense

Plaintiff has failed to comply with a condition precedent to suit against defendants in that they failed to allege the filing of a timely notice of claim.

WHEREFORE, defendants respectfully request that a judgment be entered dismissing the complaint together with costs and disbursements and for such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 20, 1983

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel
Attorney for Defendants
100 Church St., Rm 6-C-11
New York, New York 10007
212-566-3111

By: _____
Patricia A. O'Malley
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel.

RULE 3(g) STATEMENT
83 Civ. 1370 (RO)

Defendants.
_____ X

Pursuant to Rule 3(g) of the Civil Rules For the Southern District, plaintiffs submit the following material facts which they contend are not in dispute:

1. Plaintiffs Eduardo Soto-Lopez and Eliezer Baez-Hernandez are currently residents of the State of New York. Both are citizens of the United States.

2. Plaintiff Soto-Lopez became a resident of the State of New York in August of 1965.

3. Plaintiff Baez-Hernandez became a resident of the State of New York in July of 1968.

4. At the time plaintiffs entered the Armed Forces both were citizens of the United States and residents of the Commonwealth of Puerto Rico.

5. Plaintiff Soto-Lopez entered the United States Army on November 7, 1961 and served until October 24, 1963, when he was honorably discharged from active service and entered reserve status. He was honorably discharged from reserve status on October 31, 1967.

6. Plaintiff Baez-Hernandez entered the United States Army on September 2, 1958 and served until August 23, 1960, when he was honorably discharged from active service and entered reserve status. In July of 1968 Baez-Hernandez was called back to active duty and served for 15 days at Fort Drum in Watertown, New York.

7. While on active duty at Fort Drum Plaintiff Baez-Hernandez was injured. The Veterans Administration determined on October 10, 1973 that this injury caused plaintiff to become partly disabled (10%), and entitled him to receive disability payments.

8. Both plaintiffs have taken at least one New York City Civil Service competitive examination.

9. In 1980 Plaintiff Soto-Lopez took the New York City Civil Service competitive examination for the position of housing caretaker in which he obtained a score of 88.0. Five (5) additional points were initially credited to his score based on his veteran status giving him a final score of 93.0.

10. On or about December 15, 1982 plaintiff Soto-Lopez was called for an interview and medical exam for the housing caretaker position.

11. Plaintiff Soto-Lopez was called for a final interview on or about December 20, 1982. At that time the five additional points previously credited to his score were cancelled because he was a resident of commonwealth of Puerto Rico at the time he entered the Armed Forces and was therefore not a "veteran" within the meaning of the law for purposes of granting the veterans preference points.

12. Plaintiff Soto-Lopez's eligibility list number was dropped by the defendants to a point where he was no longer considered for the position.

13. On or about June 20, 1980 Plaintiff Baez-Hernandez took the New York City Civil Service Competitive examination for the position of Human Resources Specialist in which he obtained a score of 77.3. Because of the disability he incurred while on active duty in the service he was granted ten (10) additional points to his score on that examination giving him a final score of 87.3.

14. Plaintiff Baez-Hernandez consequently received an appointment as Human Resources Specialist (on or about June 1, 1981). Two days later, however, the defendants cancelled the ten (10) additional points previously credited to plaintiff's score because he was a resident of the commonwealth of Puerto Rico at the time he entered the Armed Forces and was therefore not a "veteran" within the meaning of the law for purposes of granting the veterans preference points.

15. Thereafter, sometime in 1981, plaintiff Baez-Hernandez took the New York City Civil Service competitive examination for the position of O.C. Research Assistant in which he obtained a score of 75.3. Ten (10) points were initially credited to his score because of the disability he sustained while on active duty in the service giving him a final score of 85.3.

16. In 1981 plaintiff Baez-Hernandez also took the New York City Civil Service competitive examination for the position of Assistant Accountant in which he obtained a score of 76.052. Ten points were also added to his final score on that exam giving him a final score of 86.052.

17. On or about March 31, 1982, the New York City Department of Personnel appointed plaintiff Baez-Hernandez to the position of Assistant Accountant. Immediately thereafter, however, the Department cancelled the appointment for the same reason that plaintiff was not a "veteran" within the meaning of the law for the purpose of granting veterans preference points.

18. On or about September 21, 1982 plaintiff Baez-Hernandez was appointed by the New York City Department of Personnel to the position of O.C. Research Assistant with the Department of Environmental Protection. However, before the effective date of that appointment (October 4, 1982) the Department once again cancelled the appointment because, as before, plaintiff was not a "veteran" within the meaning of the law for purposes of granting veterans preference points.

19. Each time that plaintiff Baez-Hernandez' appointments were cancelled and the additional ten (10) points deducted his eligibility number was dropped concomitantly. His numbers were dropped so low that, although he ultimately obtained employment, he had to wait an excessive amount of time.

Dated: New York, New York
October 11, 1983

JACK JOHN OLIVERO
ROBERT L. BECKER
CASSIE DE SILVESTORE
Puerto Rican Legal Defense
& Educational Fund, Inc.
95 Madison Avenue
Suite 1304
New York, New York 10016
(212) 532-8470
ATTORNEY FOR PLAINTIFF'S

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ELIEZER BAEZ-HERNANDEZ, duly sworn according to law, upon his oath deposes and says:

1. I am the above named person and reside at 2255 Bronxwood Avenue, Apartment 2B, Bronx, New York 10469. I am a citizen of the United States.

2. On September 2, 1958 I entered the United States Army and served until August 23, 1960 when I was honorably discharged from active service and entered reserve status.

3. At time I entered the service I was a citizen of the United States and a resident of the Commonwealth of Puerto Rico.

4. In July of 1968 I became a resident of the State of New York. In 1970 I was called back to active duty and served for 15 days at Fort Drum in Watertown, New York.

5. While on active duty at Fort Drum, I was injured. The Veterans Administration determined on October 10, 1973 that this injury had caused me to become partly (10%) disabled and that I was entitled to receive disability payments.

6. On or about June 20, 1980, I took the New York City civil service competitive examination number 8057 for the position of Human Resources Specialist, on which I obtained a raw score of 77.3. However, because of the disability I incurred while on active duty in the Service, I was awarded ten (10) additional points thus raising my final score to 87.3

7. I consequently received an appointment as a Human Resources Specialist on or about June 1, 1981. Two days later, however, the defendants canceled the ten (10) point additional credits given me because I was a resident of the Commonwealth of Puerto Rico at the time I entered the Armed Forces. I was subsequently rejected for the position I had already been offered.

8. Thereafter, sometime in 1981, I took the New York City civil service competitive examination number 8144 for the position of O.C. Research Assistant on which I obtained a raw score of 75.3. A ten point additional credit was added to this score raising it to a final score of 85.3

9. In 1981 I also took the New York City civil service competitive examination number 0153 for the position of Assistant Accountant on which I obtained a raw score of 76.052. A ten point additional credit was added to this score raising it to a final score of 86.052.

10. On or about March 31, 1982, the New York City Department of Personnel appointed me to the position of Assistant Accountant. Immediately thereafter, however, the Department cancelled my appointment for the same reason that I was not a resident of New York State at the time I entered the Armed Forces.

11. On or about September 21, 1982, however, I was appointed by the New York City Department of Personnel to the position of O.C. Research Assistant with the Department of Environmental Protection. But before the effective date of that appointment (October 4, 1982) the Department once again cancelled the appointment because, as before, I was not a resident of New York State at the time I entered the Armed Forces.

12. Each time that my appointments were cancelled and the additional ten (10) points deducted I was told that my eligibility list number would be dropped concomitantly. My numbers were dropped so low that I had to wait a very long time to be summoned for employment.

13. This affidavit has been translated into Spanish for me, and I fully understand its content.

_____

ELIEZER BAEZ-HERNANDEZ

Sworn to and subscribed before
me this 8th day of September, 1983

_____

NOTARY PUBLIC

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

EDUARDO SOTO-LOPEZ, duly sworn according to law upon his oath deposes and says:

1. I am the above-named person, and reside at 96 Hart Street, Brooklyn, New York. I am a citizen of the United States.

2. I entered the United States Army on November 7, 1961 and served until October 24, 1963. I was honorably discharged from active service on October 24, 1963 and on that date entered reserve status. I was honorably discharged from reserve status on October 31, 1967.

3. At the time I entered the Armed Forces I was a citizen of the United States and a resident of the Commonwealth of Puerto Rico. I became a resident of the State of New York on August 20, 1965.

4. In 1980, I took the New York City civil service competitive examination number 5003 for the position of housing caretaker on which I obtained a raw score of 88.0. Five (5) additional points were credited to my score on the basis of my status as a veteran of active service in the Armed Forces raising my final score to 93.0.

5. On or about December 15, 1982, I was called for an interview for the housing caretaker position and a medical examination.

6. I was called for a final interview on or about December 20, 1982. At that time the five additional points previously credited to my score were cancelled because I was a resident of the commonwealth of Puerto Rico at the time I entered the Armed Forces.

7.My eligibility list number was dropped by the defendants to the point where I was no longer considered for the position.

8. This affidavit has been translated into Spanish for me, and I fully understand its content.

EDUARDO SOTO-LOPEZ

Sworn to and subscribed before me
this 8th day of September, 1983

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel,

Defendants.

83 Civ. 1370 (RO)

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

BRENDA S. SPEARS, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, appearing herein as Intervenor, *pro se*. I am fully familiar with the facts hereinafter set forth either from my knowledge or based on a review of the files in possession of this office. I submit this affidavit in opposition to plaintiffs' motion for summary judgment.

2. This is an action premised on an alleged violation of rights secured to plaintiffs by the equal protection clause of the fourteenth amendment to the federal constitution. Plaintiffs Eduardo Soto-Lopez and Eliezer Baez-Hernandez, claiming to be

honorably discharged veterans who were residents of Puerto Rico when they joined the armed forces, have alleged that the named defendants created an improper classification under the equal protection clause of the fourteenth amendment when, in accordance with Article V, Section 6 of The New York Constitution and Section 85 of the Civil Service Law, they failed to add bonus points to the raw scores received by plaintiffs on New York City comprehensive civil service examinations on the ground that neither plaintiff was a New York State resident when he joined the armed services. Plaintiffs further contend that these provisions infringe on their right to travel.

Procedural History of The Case.

3. Plaintiffs served the instant summons and complaint on the defendants on or about February 22, 1983. Issue was joined by service of the answer on or abut April 20, 1983.

4. By notice of motion dated October 11, 1983, plaintiffs moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order of summary judgment declaring the constitutional and statutory provisions to be unconstitutional as a matter of law under the equal protection clause. A letter dated November 23, 1983, a copy of which is annexed hereto as Exhibit A, certified to ROBERT ABRAMS, as Attorney General of the State of New York pursuant to 28 U.S.C. §2403, the fact that the constitutionality of Article V, Section 6 of the New York Constitution and Section 85 of the Civil Service Law had been drawn into question in this litigation.

5. Counsel for the parties have stipulated to the intervention in this action of ROBERT ABRAMS, Attorney General of the State of New York, and have submitted said stipulation to this Court. A copy of this stipulation is annexed hereto as Exhibit B.

The Constitutional and Statutory Provision Challenged by Plaintiffs Are Constitutional.

6. As set forth in the accompanying memorandum of law, the constitutional and statutory provisions presently before the Court

have been repeatedly found constitutional by both the state and the federal courts in cases which are factually indistinguishable for the instant litigation. And, it is submitted, said provisions should be upheld here.

7. While the statutory scheme does distinguish between veterans who were residents when they joined the service and those who were not, this distinction is consistent with the equal protection clause because it results in a modest, one time compensatory benefit, accorded to further the State's reasonable and rational interest in encouraging its residents to serve in the armed forces and to lessen the disruption military service causes in these veterans' lives.

8. Specifically, under Article V, Section 6 of the State's Constitution and Civil Service Law 85, veterans who were New York residents prior to joining the armed forces and who served at a time of war are entitled to add 5 additional points to the raw score achieved in a comprehensive examination for original appointment if the veteran's score would otherwise entitle him or her a place on the "eligible list"; 2 1/2 additional points are added in examinations for promotion. Disabled veterans are entitled to an additional 10 points for original appointment and 5 points for promotions. Eligible veterans can use the bonus points only one time.

9. It is submitted that the People of this State have justifiably chosen to compensate those of its residents who serve in the armed forces when, and if, such veterans take comprehensive civil service examinations.

WHEREFORE, ROBERT ABRAMS, as Intervenor, respectfully urges that plaintiffs' motion for summary judgment be denied in all respects and the complaint in this action dismissed

with prejudice and judgment entered for the defendants, with costs.

BRENDA S. SPEARS

Sworn to before me
this 9th day of January, 1984

Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel

NOTICE OF MOTION

83 Civ. 1370 (RO)

Defendants
X

PLEASE TAKE NOTICE that upon the Affidavit of Beth G. Schwartz, sworn to January 12, 1984, the Rule 3(g) Statement of Material Facts submitted by City defendants, and upon all the prior pleadings and proceedings in this action, the undersigned will move this Court on January 20, 1984, at 2:15 P.M. before the Honorable Richard Owen, for an order pursuant to Rule 56(b) of the Federal Rules of Civil Procedure granting summary judgment in favor of defendants New York Civil Service Commission, New York City Department of Personnel, Mark Lebow, and Juan Ortiz, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 11, 1984

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for City Defendants
100 Church Street
Room 6-C-26
New York, New York 10007
(212) 566-2736

By: _____
BETH G. SCHWARTZ
Assistant Corporation Counsel

TO: CLERK OF THE COURT
Puerto Rican Legal Defense & Education
Fund, Inc.
Attorneys for Plaintiffs
95 Madison Avenue
New York, New York 10016
(212) 532-8470
Attn: Robert Becker, Esq.

Hon. Robert Abrams
Attorney General of the State of New York
Attorney for Intervenor-Defendant
Two World Trade Center 49th Floor
New York, New York 10047
(212) 488-5745
Attn: Brenda S. Spears, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel

Defendants
_____ X

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION

83 Civ. 1370 (RO)

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

BETH G. SCHWARTZ, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the Office of Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York, attorney for defendants New York City Civil Service Commission, New York City Department of Personnel, Mark Lebow and Juan Ortiz (hereinafter "City defendants"). I am familiar with the facts and circumstances of this action.

2. This affidavit is submitted in opposition to plaintiffs' motion for summary judgment and in support of City defendants' cross-motion for summary judgment in their favor pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

3. In this action, plaintiffs challenge the constitutionality of the veterans preference which is set forth in Article V § 6 of the New York State Constitution and § 85(1)(a) of the New York State Civil Service Law. Plaintiffs assert their claim under 42 U.S.C. § 1983.

4.Article V § 6 of the New York State Constitution provides, in pertinent part, that additional credit shall be given on civil service examinations to:

> ... any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such services....

5. The veterans preference statute, § 85 of the Civil Service Law, carries out this constitutional mandate and provides that veterans shall be entitled to additional credit in competitive civil additional examinations. Section 85(1)(a) defines a veteran as:

> ... a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application....

6. Plaintiffs limit their challenge to one particular aspect of the veterans preference statute and the constitutional provision, to wit: the requirement that a veteran have been a resident of the State of New York at the time that he entered the armed forces. Plaintiffs contend in this action that this residency requirement is invalid as contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution and as an unconstitutional interference with their right to travel.

7. Plaintiffs are two individuals who claim to have been denied appointment for positions within the New York City civil service system because of the failure of the Department of Personnel to grant to them the additional points to which some veterans are entitled under Civil Service Law 85 and the State Constitution, Article V § 6. Plaintiffs concede that they were both residents of jurisdictions other than New York at the time that they entered the armed forces and that, under the present terms of the statute and Constitution, they are not entitled to a veterans preference.

8. The original defendants in this action are two agencies and two officials of the City of New York. The State of New York has recently intervened in this action as a defendant.

9. City defendants submit that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. As is fully set forth in the papers submitted by the State in opposition to the plaintiffs' summary judgment motion, the residency requirement set forth in the veterans preference statute and the State constitutional provision is a proper and valid requirement in that it serves a legitimate and compelling state purpose.

10. Morever, even if this Court were to hold that the challenged statute and constitutional provision are invalid, City defendants are nevertheless entitled to judgment as a matter of law. The only involvement of City defendants in the issues raised in this action was to act, as they must, in accordance with the clear mandate of the State Constitution and Civil Service Law. City defendants are not responsible for the adoption of the veterans preference statute or the relevant constitutional provision. City defendants are not responsible for the adoption of the veterans preference statute or the relevant constitutional provision. City defendants at all times acted upon a good faith belief in the validity of the State-mandated veterans preference requirements. Therefore, no liability can be found to exist on the part of City defendants, and they are entitled to judgment as a matter of law.

11. No prior applications for the relief requested herein have been made.

BETH G. SCHWARTZ
Assistant Corporation Counsel

Sworn to before me this
12th day of January, 1984

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK X

EDUARDO SOTO-LOPEZ and
ELIEZER BAEZ-HERNANDEZ,

Plaintiffs,

-against-

NEW YORK CITY CIVIL SERVICE COMMISSION; NEW YORK CITY DEPARTMENT OF PERSONNEL; MARK LEBOW, individually and as Chairman of the New York City Civil Service Commission; and JUAN ORTIZ, individually and as Director of the New York City Department of Personnel.

Defendants.
X

STATEMENT PURSUANT TO RULE 3(g)

83 Civ. 1370 (RO)

Pursuant to Rule 3(g) of the General Rules of the United States District Court for the Southern District of New York, defendants NEW YORK CITY CIVIL SERVICE COMMISSION, NEW YORK CITY DEPARMTENT OF PERSONNEL, MARK LEBOW, and JUAN ORTIZ offer the following statement of material facts as to which there is no genuine issue to be tried, in support of the cross-motion for summary judgment in their favor:

1. In 1980, plaintiff Eduardo Soto-Lopez took a New York City civil service examination for the position of housing caretaker.

2. In 1980, Eliezer Baez-Hernandez took a New York City civil service examination for the position of Human Resources Specialist.

3. In 1981, plaintiff Eliezer Baez-Hernandez took a New York City civil service examination for the position of Research Assistant.

4. In 1981, plaintiff Eliezer Baez-Hernandez took a New York City civil service examination for the position of Assistant Accountant.

5. Plaintiffs applied for additional points on each of the civil service examinations which they took, claiming that they had been veterans under the definition set forth in New York State Civil Service Law § 85(1)(a).

6. Each of the plaintiffs informed the New York City Department of Personnel that they were not residents of the State of New York at the time that they entered into the armed forces of the United States.

7. Each of the plaintiffs were denied additional veterans preference points on each of the civil service examinations which they took because they did not meet the definition of "veteran" as set forth in Civil Service Law § 85(1)(a), in that they had not been residents of the State of New York at the time that they entered the armed forces of the United States.

8. In denying to plaintiffs additional veterans preference points on each of the civil service examinations which they took the New York City Department of Personnel acted pursuant to Article V § 6 of the New York State Constitution and § 85 (1)(a) of the New York State Civil Service Law.

Dated: New York, New York
January 11, 1984

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for City Defendants
100 Church Street
Room 6 C 26
New York, New York 10007
(212) 566-2736

By: _____
BETH G. SCHWARTZ
Assistant Corporation Counsel

APPELLEE'S

BRIEF

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.

No. 84-1803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellant,

—vs.—

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

JUAN CARTAGENA*
KENNETH KIMERLING
LINDA FLORES
Puerto Rican Legal Defense & Education Fund, Inc.
99 Hudson Street - 14th Floor
New York, New York 10013
(212) 219-3360

*Counsel of Record

Attorneys for Appellees

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Do Article V, § 6 of the New York State Constitution and § 85 of the New York State Civil Service Law, which provide a preference for civil service employment only to resident veterans who entered the armed forces while New York residents, violate the constitutional right to travel and to equal protection of the laws of other veterans who migrated to New York after their induction?

2. Do the decisions in *Zobel* v. *Williams*, 457 U.S. 55 (1982) and *Hooper* v. *Bernalillo County Assessor*, ____ U.S. ____, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) overrule this Court's summary affirmance in *August* v. *Bronstein*, 417 U.S. 901 (1974)?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
1. Facts Material To Consideration Of The Questions Presented	1
2. The Course Of Proceedings And Disposition In The Courts Below	4
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. NEW YORK'S VETERAN PREFERENCE PROVISIONS VIOLATE THE PLAINTIFFS' RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	9
A. New York's Discriminatory Veteran Preference Scheme Is Not Rationally Related To Any Legitimate Government Interest	10
1. Compensating Veterans For Their Services And Lessening The Burden Of Their Military Service	13
2. Encouraging Veterans To Settle In New York And Enter The Civil Service	14
3. Encouraging Service In The Armed Services	17
4. Conclusion	25

PAGE

II. NEW YORK'S VETERAN PREFERENCE PROVISIONS VIOLATE PLAINTIFFS' CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL 25

A. Equal Protection 29

B. The Privileges And Immunities Clause Of Article IV Of The Constitution 32

C. Balancing Test 34

D. Conclusion 35

III. THE DECISION IN *AUGUST* v. *BRONSTEIN* HAS BEEN OVERRULED BY *ZOBEL* v. *WILLIAMS* AND *HOOPER* v. *BERNALILLO COUNTY ASSESSOR*..... 36

CONCLUSION..... 37

STATUTORY APPENDIX

N.Y. Civil Service Law § 85 (Consol. 1982 and Supp. 1984-85) S-1

TABLE OF AUTHORITIES

Cases: PAGE

Andrade v. *Nadel*, 477 F. Supp. 1275 (S.D.N.Y. 1979).. 27

August v. *Bronstein*, 369 F. Supp. 190 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 419 U.S. 901 (1974) 4, 7, 36

Boone v. *Lightner*, 319 U.S. 561 (1943) 14

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 10, 30, 31

Edelman v. *Jordan*, 415 U.S. 651 (1974) 36

Guardians Association v. *Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980), *cert denied*, 452 U.S. 940 (1981) 27

Guardians Association v. *Civil Service Commission*, 431 F. Supp. 526 (S.D.N.Y.), *reversed on other grounds*, 562 F.2d 38 (2d Cir. 1977) 15

Hicklin v. *Orbeck*, 437 U.S. 518 (1978) 25, 32

Hooper v. *Bernalillo County Assessor*, ___ U.S. ___, 86 L.Ed.2d 487 (1985).....*passim*

In Re Van Aukens Estate, 31 N.Y.S.2d 897 (Sur. Ct. 1941)..... 19

Jones v. *Helms*, 452 U.S. 412 (1981).....29, 34

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974).....10, 30, 31, 33

Neville v. *Bronstein*, 77 Misc.2d 716, 354 N.Y.S.2d 567 (N.Y. Sup. Ct. 1974)..... 20

Regan v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983) 9, 13

Richardson v. *Ramirez*, 418 U.S. 24 (1974) 36

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 10, 25, 26, 29, 30, 31, 33

PAGE

Sosna v. *Iowa*, 419 U.S. 393 (1975).....30, 31

Soto-Lopez v. *New York City Civil Service Commission*, 755 F.2d 266 (2d Cir. 1985), *prob. juris. noted sub nom. Attorney General of the State of New York* v. *Soto-Lopez*, 105 S.Ct. 3523 (1985) .....*passim*

Toomer v. *Witsell*, 334 U.S. 385 (1948) 32

United Building and Construction Trades Council of Camden County and Vicinity v. *Mayor and Council of The City of Camden*, ____ U.S. ____, 79 L.Ed.2d 249 (1984)..... 32

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 36

Vlandis v. *Kline*, 412 U.S. 441 (1973)..... 34

Ward v. *Maryland*, 12 Wall 418, 20 L.Ed. 449 (1871) .. 32

Zobel v. *Williams*, 457 U.S. 55 (1982) .....*passim*

Constitutional Provisions:

U.S. Const. Preamble 21, 26

U.S. Const. art. IV, § 2.....8, 26, 29, 32, 33, 34, 35

U.S. Const. Amend. XIV, § 1 .....*passim*

N.Y. Const. art. V, § 6 (McKinney 1969) .....*passim*

N.Y. Const. art. V, § 6 (1945) (effective Jan. 1, 1946) (amended 1969)..... 23

N.Y. Const. art. V, § 6 (1929) (effective Jan. 1, 1930) (amended 1945)..... 23

Statutory Provisions:

50 U.S.C. app. § 455(b)..... 21

N.Y. Estates, Powers and Trusts Law § 6-3.2(a)(2)(A) .. 19

N.Y. Estates, Powers and Trusts Law § 6-3.2(a)(2)(D) .. 19

PAGE

N.Y. Estates, Powers and Trusts Law § 6-4.7..... 19

N.Y. Estates, Powers and Trusts Law § 6-4.10..... 19

N.Y. Civil Service Law § 85(1)(a) .....*passim*

N.Y. Civil Service Law § 85(1)(c)(4) 2, 3, 13, 35

N.Y. Civil Service Law § 85(4) 1

N.Y. Civil Service Law § 85(7) 28

Act of Feb. 21, 1863, ch. 14, 1863 N.Y. Laws 18 21

Act of May 29, 1884, ch. 410, 1884 N.Y. Laws 487 23

Act of May 12, 1921, ch. 702, 1921 N.Y. Laws 2483 ... 23

Act of Apr. 8, 1930, ch. 374, 1930 N.Y. Laws 795 23

Act of Apr. 15, 1946, ch. 521, 1946 N.Y. Laws 1155 ... 23

Act of Apr. 3, 1951, ch. 505, 1951 N.Y. Laws 1259 ....20, 24

Act of Apr. 15, 1958, ch. 790, 1958 N.Y. Laws 943 24

Act of Aug. 1, 1966, ch. 908, 1966 N.Y. Laws 2695.... 24

Act of June 11, 1973, ch. 694, 1973 N.Y. Laws 2267 ... 24

Act of June 8, 1976, ch. 318, 1976 N.Y. Laws 840 .....20, 24

Act of June 3, 1983, ch. 219, 1983 N.Y. Laws 415 24

Other Authorities:

Hearing Before The Subcommittee on Education, Training and Employment of the Committee on Veteran's Affairs, House of Representatives, 98th Cong., 1st Sess., February 23, 1983 at p. 2..... 27

1946 N.Y. Attorney General Opinions 156 20

STATEMENT OF THE CASE[1]

1. Facts Material To Consideration Of The Questions Presented

Article V, Section 6 of the New York State Constitution and Section 85 of the New York Civil Service Law provide veteran preferences in civil service employment. The preference is in the form of additional points added to passing scores on civil service examinations.[2] Five points are granted for veteran status, and five additional points, or ten in all, are granted to veterans who are disabled as a result of service related injuries. To obtain these credits a veteran must meet the following six requirements:

1) have served during a "time of war" as defined by statute;
2) be honorably discharged;
3) pass a civil service examination;
4) apply for the credits before the list of eligibles is promulgated;
5) be a resident of New York; and,
6) have been a resident of New York at the time of entrance into the armed forces.

New York Constitution art. V, § 6 and New York Civil Service Law § 85. (See Brief of Appellant at S-7 for text of constitutional provision and this brief at S-1 for text of statutory

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1. Plaintiffs Appellees ("plaintiffs") do not disagree with appellant's (Attorney General of the State of New York, hereafter "Attorney General") listing of pertinent opinions below, applicable constitutional and statutory provisions and statement on jurisdiction. Accordingly, plaintiffs do not repeat them here. See Rule 34.2 of the Rules of the Supreme Court of the United States. The Brief of Appellant sets out § 85(1) N.Y. Civil Service Law in the Statutory Appendix at S-1. Plaintiffs in this brief reproduce all the provisions of § 85 N.Y. Civil Service Law in their Statutory Appendix.

2. While these may be used only once, they may be used on either entry level or promotional examination. N.Y. Civil Service Law § 85(4).

provision). Veterans who qualify under the first five requirements, but who were inducted into the armed services while residents of states or territories other than New York do not receive preference for civil service employment. It is this sixth requirement, which sets up two permanent classes of veterans based on past residency, which is the subject of this appeal.

The material facts are not in dispute. Plaintiffs Eduardo Soto-Lopez and Eliezer Baez-Hernandez met all of the requirements for the veteran preference except for the sixth one, residency in New York State at the time of the entry into the service. If they had been past residents of New York, they would have obtained civil service jobs for which they applied. Because they did not qualify for New York's veteran preference, they did not obtain these jobs.[3]

Mr. Baez-Hernandez[4] is a United States citizen. He entered the army from Puerto Rico in 1958 and served on active duty until 1960 when he was honorably discharged. He continued in the service on reserve status.

In 1968, Mr. Baez-Hernandez moved to New York. In 1970, while still a resident of New York he was recalled to active duty and was partially disabled in a service related accident.[5]

In June 1980, Mr. Baez-Hernandez took and passed a civil service examination for Human Resources Specialist. Plaintiff had applied for 10 points of veteran preference credits as a disabled veteran. He was called for appointment in June 1981. However, when it was learned that he was not a resident of

3. After the filing of the complaint, Mr. Baez-Hernandez did obtain a civil service position, although substantially later than he would have had he been treated as a disabled veteran. Compare Complaint at ¶ 40 (JA 11), with Local Rule 3(g) Statement at ¶ 19 (JA 22). References to pages in the Joint Appendix are indicated as JA ____.

4. The facts concerning Mr. Baez-Hernandez are set out in his affidavit on the motion for summary judgment. (JA 23-24). They were not disputed by defendants. (JA 37-39).

5. This active duty service qualifies Mr. Baez-Hernandez as having served in time of war. New York Civil Service Law § 85(1)(c)(4).

New York at the time of his enlistment in the army, the 10 disabled veteran points were taken away, and his appointment cancelled. This same scenario happened two more times.

In 1981, Mr. Baez-Hernandez took and passed on examinations for O.C. Research Assistant and for Assistant Accountant. He was called for appointment in March 1982, for the Assistant Accountant position, but his appointment was cancelled when his 10 veteran credits were withdrawn. Again in September 1982, he was called for appointment to the O.C. Research Assistant position, this was cancelled on the same grounds. Although Mr. Baez-Hernandez finally obtained a job by September, 1983, the record does not reflect which job and when.

Plaintiff Eduardo Soto-Lopez is a citizen of the United States.[6] He entered the armed forces in 1961 while a resident of Puerto Rico. He was honorably discharged in 1963[7] and remained on reserve status until 1967.

In August 1965, Mr. Soto-Lopez moved to New York and became a resident. In 1980 he took and passed a civil service examination for the position of Housing Caretaker. He had applied for 5 points of veteran credits and was called for appointment in December 1982. However, his appointment was cancelled, and his veteran preference points were taken away because he had not entered into the service as a New York resident. As with Mr. Baez-Hernandez, Mr. Soto-Lopez was not a "veteran" within the meaning of the law granting veteran preference points.

Therefore, plaintiffs have been denied veteran preference points and thus employment because of their prior residency, they were not residents of the State when they entered the armed services.

6. The facts concerning plaintiff Soto-Lopez are set out in his affidavit on the motion for summary judgment. (JA 25-26). The defendants below did not dispute them. (See, JA 37-39).

7. He served during a "time of war." N.Y. Civil Service Law § 85(1)(c)(4).

2. The Course Of Proceedings And Disposition In The Courts Below

Plaintiffs filed this action in February 1983 to contest whether the City of New York could constitutionally condition the grant of veteran credits upon prior residency in New York State. They alleged that Article V, § 6 of the Constitution of the State of New York and § 85(1)(a) of the New York Civil Service Law requiring plaintiffs to be New York State residents at the time they entered the army in order to qualify for the veteran preference points violated the Equal Protection Clause of the Fourteenth Amendment and unlawfully interfered with their right to travel as secured by the Constitution. (JA 6). The Attorney General intervened in the lawsuit to defend the constitutionality of these provisions. After cross-motions for summary judgment the district court granted summary judgment in favor of the defendants. (A 37).[8]

On appeal the Court of Appeals reversed.[9] (A 1). After a detailed and exacting analysis, the Court of Appeals ruled that the decision in *Zobel* v. *Williams*, 457 U.S. 55 (1982), contained doctrinal developments that undercut the binding, precedential effect of the summary affirmance in *August* v. *Bronstein*, 369 F.Supp. 190 (S.D.N.Y.), *aff'd mem.*, 417 U.S. 901 (1974). *August* v. *Bronstein* had ruled that the same provisions at issue here did not violate the Fourteenth Amendment's Equal Protection Clause and the constitutionally protected right to travel.

Turning to the merits of plaintiffs' claims, the Court of Appeals held:

> . . . we conclude that plaintiffs' constitutional challenges have merit because the distinction drawn between those

8. References to pages in the Appendix to the Jurisdictional Statement are indicated as A ____. This decision was not reported.

9. This decision is reported. *Soto-Lopez* v. *New York City Civil Service Commission*, 755 F.2d 266 (2d Cir. 1985), *prob. juris. noted sub nom. Attorney General of the State of New York* v. *Soto-Lopez*, 105 S. Ct. 3523 (1985).

> otherwise qualifying veterans who were New York residents when inducted and those who were not does not rationally further a compelling, or even a legitimate, interest of the State.

(A 20). In reaching this conclusion, the Court of Appeals reviewed the four purposes advanced by New York in support of the veteran preference provisions:

> . . . (a) compensating veterans for the service they have performed, (b) lessening the burden imposed by military service, (c) encouraging veterans to settle in New York and enter the State's civil service at the end of their military service, and (d) encouraging service in the armed forces.

(A 21). When these four purposes were framed neutrally without regard to the residence of the veteran, the court found them to be "without rational relationship to the distinction drawn by the New York provisions in terms of the veteran's residence at the time of induction." (A 25). The same purposes when framed in terms of compensating or encouraging only veterans who were inducted from New York, the court stated, are not legitimate. (A 25). Therefore, the court concluded, the provisions violate the Equal Protection Clause of the Fourteenth Amendment.

The Court of Appeals next examined the challenged provisions in light of plaintiffs' constitutionally protected right to travel. It noted that under *Zobel* v. *Williams*, the right to travel protects new residents of the state from being disadvantaged or from being treated differently because of their migration. *Id.*, 457 U.S. at 60 n.6. New York veterans who came to New York after entering the armed services were being treated differently from those who were lifelong residents or those who migrated to New York before induction. Moreover, the Court of Appeals noted that "veterans who did not enter the armed forces from New York are in effect penalized for travelling to New York." (A 29). This penalty is manifested each time a competitor uses the veteran preference points and excludes the veteran who is denied the preference from ever obtaining the bonus points. (A 29).

The Court of Appeals concluded that the provisions which burdened the right to travel had failed to meet the compelling-state-interest test of the Equal Protection Clause of the Fourteenth Amendment. (A 30). The provisions were declared unconstitutional. (A 31).

Judge Oakes filed a concurring opinion in which he declined to join the Court's Equal Protection analysis but agreed that the New York provisions violated the plaintiffs' constitutionally protected right to travel. (A 35-36).

Finally, the Court of Appeals held "that the proper remedy here is to require the State . . . to extend the veteran preference to otherwise qualifying veterans who were not residents of New York at the time they entered the armed forces." (A 32). It remanded the case for the entry of declarative and injunctive relief and for further proceedings as to the individual relief requested in the complaint. (A 35).

On May 10, 1985, the Attorney General filed a timely notice of appeal to this Court. (A 40). Neither the New York City Department of Personnel nor the New York City Civil Service Commission, both defendants below, have appealed the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

The State of New York provides, by its Constitution and by its Civil Service Laws, a preference for veterans in civil service employment. New York Constitution, art. V, § 6; New York Civil Service Law § 85. Veterans who served in the armed forces during a "time of war," who are honorably discharged, and who pass a competitive civil service examination are entitled to 5 additional points on their examination score or 10 points if they were disabled as a result of their service. *Id.* In order to qualify for the preference, veterans must be residents of New York at the time they apply for the credits and must show that they were residents of New York at the time of entrance into the armed forces. Plaintiffs were denied the

veteran preference although they met all the requirements for the preference except for prior residency. Plaintiffs entered the armed forces while residents of Puerto Rico and then settled in New York after leaving the service. They will, therefore, never qualify for the benefit. Thus, New York's veteran provisions establish two permanent classes of resident veterans based on past or prior residency. Plaintiffs challenge the use of prior residency as the determining factor in the award of veteran benefits.

This Court's recent decision in *Hooper* v. *Bernalillo County Assessor*, ___ U.S. ___, 86 L.Ed.2d 487 (1985), and its earlier decision in *Zobel* v. *Williams* compel a finding that New York's veteran preference violates the Equal Protection Clause of the Fourteenth Amendment and the constitutional right to travel. Both of those cases held that a state may not distribute benefits to its residents based solely on past or prior residency. *Hooper*, 86 L.Ed.2d at 496; *Zobel*, 457 U.S. at 63. Here, plaintiffs and other migrating veterans have moved to New York and have met all the qualifications for the veteran preference except for prior residency. New York serves no legitimate state purpose by denying plaintiffs these benefits based on these distinctions. *Hooper*, 86 L.Ed.2d at 496; *Zobel*, 457 U.S. at 63.

Moreover, the purposes for the veteran preference asserted by New York are not rationally related to the distinctions based on prior residency. The veteran preference is purportedly provided to: a) compensate veterans for the service they have performed, b) lessen the burden imposed by military service, c) encourage veterans to return to New York and enter the State's civil service, and d) encourage service in the armed forces. (A 21). Veterans from every state served in the national defense. The burdens that they suffered were personal and not related to where they lived prior to joining the armed services. *Hooper*, 86 L.Ed.2d at 495. New York provides these veterans a benefit in gratitude for their service and for the disruptions it may have caused. *August* v. *Bronstein*, 369 F. Supp. at 193. Since a veteran's service to the Nation was without relation to the state

from which he or she came, benefits for that service cannot rationally be related to prior residency.

Because the distinctions between resident veterans is based on prior residency, the right to travel is implicated. Plaintiffs exercise of this right has been penalized by the denial of this preference where the difference of even one point can mean hundreds, if not not thousands of names on the list of eligibles. New York's preference can, therefore, mean the difference between being employed in a secure position and being unemployed. Thus, New York's provisions have penalized travel by denying plaintiffs benefits which, in economic turns alone, far exceed those addressed in *Zobel* and *Hooper*.

As a result, the fundamental right to travel is involved and the Court must closely scrutinize the justifications for the penalty on travel. *Zobel*, 457 U.S. at 66 n.1 (Brennan, J., concurring). Whether this is done under the Equal Protection Clause's compelling-state-interest test, *Shapiro* v. *Thompson*, 394 U.S. 618, 627 (1969), or whether this is done under the two-part test imposed by the Privileges and Immunities Clause of Article IV of the Constitution, *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in the judgment), or whether a balancing test between the state's interest and the burden imposed on the right to travel is employed, *Jones* v. *Helms*, 452 U.S. 412, 427 (1981) (White, J., concurring), New York cannot justify this distinction. As there is no legitimate state interest in imposing this distinction, there certainly can be no compelling state interest. As there is no rational relationship, there can be no substantial relationship. And, as the State's interest is not legitimate, it is easily outweighed by the interest in unburdened interstate travel. New York's provisions violate the constitutional right to travel.

All residents of New York must be treated equally without distinctions based on non-legitimate or irrelevant characteristics. Prior residency is not a legitimate characteristic to determine benefits for veterans of this nation's wars.

ARGUMENT

I

NEW YORK'S VETERAN PREFERENCE PROVISIONS VIOLATE THE PLAINTIFFS' RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

New York's veteran preference provisions create a distinction between bona fide residents who were veterans in the national armed services. Veterans, whether lifelong residents of the State or migrants to New York the day before they enter the armed forces, are favored over all veterans who settle in the state after their induction into the army.[10] The former get a substantial hiring (or promotional) advantage in civil service employment. The latter get nothing for their equal contribution to our nation's military effort.

At issue here is not the constitutionality of state statutes which grant benefits to veterans over non-veterans. *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983). Instead the focus here is on New York's treatment of two permanent[11] classes of bona fide resident veterans. One class consists of those veterans who entered the service from New York. The second class, who receive no benefits, are those who settled in New York after their entry into the armed services. "When a State distributes benefits unequally, the

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10. Prior residence in the state is only one of the requirements to obtain the preference, and is the only one disputed here. The other requirements are that the veteran have served during the "time of war" as defined by statute and be honorably discharged. The veteran must also be a present resident of the State, pass a civil service test, and request the veteran credits prior to the time a list of eligibles is established. N.Y. Constitution, art. V, § 6 and N.Y. Civil Service Law § 85.

11. These classes are permanent and fixed at the point in time that the veteran entered the armed forces. Regardless of how long a veteran, who moves to New York remains a New York resident, there is nothing he or she can do to change that status. See, *Zobel*, 457 U.S. at 59.

distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hooper* v. *Bernalillo County Assessor*, ___ U.S. ___ , 86 L.Ed.2d 487, at 493 [footnote omitted].

Having created this invidious distinction based on past residency, New York bears the burden under the Equal Protection Clause of showing that the distinction serves a legitimate state purpose.[12] *Hooper*, 86 L.Ed.2d at 493; *Zobel* 457 U.S. at 60-61. The reasoning of the Court in *Hooper* and *Zobel* compels a finding that New York's reliance on past residency for the distribution of benefits violates the Equal Protection Clause.

A. New York's Discriminatory Veteran Preference Scheme Is Not Rationally Related To Any Legitimate Governmental Interest

As stated above, the holdings and reasoning of the Court in *Hooper* and *Zobel* control this case. In *Zobel* Alaska enacted a statute in 1980 that distributed the State's income from its natural resources to its residents in amounts proportional to the length of their residency beginning in 1959. Each year of residence was valued at $50. A resident of one year obtained $50, and a native Alaskan with 21 years residence obtained $1050. *Zobel*, 457 U.S. at 57. The Court found that Alaska's scheme discriminated in favor of established residents over newcomers. The statute also made distinctions among native born residents, since residents who were born after 1959 would never receive the annual dividends which the State retroactively

12. New York has conditioned the award of state benefits to veterans on past residency in the State, and has therefore, burdened the exercise of the fundamental right to free interstate travel. See Point II, *infra*. When the right to travel is implicated, the appropriate method of analysis under the Equal Protection Clause is the heightened scrutiny reserved to classifications that impede fundamental rights. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). However, "if the statutory scheme cannot pass even the minimum rationality test, [the] inquiry ends." *Hooper*, 86 L.Ed.2d at 493.

awarded to its citizens based on length of residency commencing in 1959. *Id.* at 59 n.5. The Court subjected these distinctions among residents to an analysis under the Equal Protection Clause. Alaska proffered two reasons for its statutory scheme. First, it claimed that the benefits were an incentive to encourage people to move to the State. Secondly, it asserted that the rewards were for tangible and intangible contributions made by its residents over the years. *Id.* at 61. This Court held that the State's purpose of creating an incentive for people to establish residency in the State was not rationally related to the statute because it made distinctions between newer and older residents—in fact, because new residents obtained less, the scheme would serve as a disincentive. *Id.* at 61-62. More importantly, this Court rejected Alaska's asserted interest in rewarding its citizens for their past contributions to the State. The reward of past contributions, whether tangible or intangible, measured solely by past residency, was held not to be a legitimate state purpose. *Id.* at 63. Thus, the Alaska dividend distribution scheme violated the Equal Protection Clause. *Id.* at 65.[13]

The veteran tax exemption scheme in *Hooper* ran afoul of the Equal Protection Clause for reasons similar to those expressed in *Zobel*. *Hooper*, 86 L.Ed.2d at 496. In *Hooper* New Mexico provided Vietnam veterans a $2,000 real property tax exemption if the veteran was a resident of the State before May 8, 1976. Those veterans who arrived in New Mexico after that date were denied the tax exemption. New Mexico offered two justifications for the discrimination it created among its resident veterans. First it asserted that the purpose was to encourage veterans to move to the State. The Court found that this state interest was not rationally related to the distinction it

13. Five Justices in *Zobel* would have also declared Alaska's dividend distribution scheme in violation of the constitutionally protected right to travel. *Id.* at 615 (Brennan, J. with whom Marshall, Blackmun and Powell, J.J. joined, concurring); *Id.* at 71 (O'Connor, J., concurring in the judgment). As stated in Point II below, New York's provisions similarly violate the right to travel.

made between the two classes of veterans. *Id.* at 494. Secondly, New Mexico sought to reward its veterans for their military service. The Court held that, under *Zobel*, this was not a legitimate purpose, because it measured the past contributions that a veteran made to the nation's war effort solely on the basis of past residency. *Id.* at 496. Like Alaska's scheme in *Zobel*, New Mexico's veteran tax exemption violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 497. Both made distinctions between their residents based solely on past or prior residency.

It is under these holdings that New York's provisions must be analyzed. New York advanced four purposes which it claimed were furthered by its veteran preference scheme:

> (a) compensating veterans for the service they have performed, (b) lessening the burden imposed by military service, (c) encouraging veterans to settle in New York and enter the State's civil service at the end of their military service, and (d) encouraging service in the armed forces.

(A 21). These purposes, although legitimate, provide no basis whatsoever for the distinction between veterans who were residents of New York at the time of induction and veterans who became residents of New York afterwards.[14] Stated another way, the purposes are not rationally related to the veteran's "*relevant* characteristics." *Zobel*, 457 U.S. at 70 (Brennan, J., concurring) [emphasis in original]. These same purposes when viewed only as benefits to veterans who can show some past or prior residence in New York are not legitimate purposes.

14. Unlike New Mexico in *Hooper*, the State here does not, nor could not, claim that the distinctions it creates are related to protecting the public fisc. *Hooper*, 86 L.Ed.2d at 499 (Stevens, J., dissenting). Civil service jobs have to be filled in any event, whether by resident veterans, new or old, or by non-veterans.

1. *Compensating Veterans For Their Services And Lessening The Burden Of Their Military Services*

The United States has a longstanding commitment to assist veterans in many ways for their past contributions to this country's military needs. *Regan* v. *Taxation With Representation Of Washington*, 461 U.S. 540, 551 (1983). Veterans as a group may be entitled to special and preferential treatment "and such differential treatment vis-a-vis non-veterans does not offend the Equal Protection Clause." *Hooper*, 86 L.Ed.2d at 495. The State, therefore, can award benefits to "bona fide veterans" in a way that does not create "invidious [or] irrational distinctions among its residents." *Id.*

New York's veteran credits provision clearly seeks to fulfill two laudatory purposes, compensating veterans for their service and lessening the burden of their military service. If the provisions provided benefits to all veterans, the provisions would be rationally related to the purported purposes. However, New York, as New Mexico did in *Hooper*, favors resident veterans who resided in the State as of a fixed date[15] over other veterans. The purpose, therefore, although legitimate, is not rationally related to the invidious distinction New York has created.[16] Moreover, persons who enter the armed forces do not serve the State from which they enter but rather the entire country. Although plaintiffs initially entered the service as residents of Puerto Rico, their actual service benefitted the people of New York State to the same extent as persons who entered the service as residents of New York. As the Court of Appeals noted: "The benefits that accrue to a state from an individual's military service come by virtue of the state's

15. The fixed date is their date of entrance into the armed forces.

16. The irrationality of New York's preference is quite evident from the experience of plaintiff Baez-Hernandez. When he was recalled to the service in 1970, he had been a New York resident for approximately two years. (JA 23). It was this service that qualified him as a "time of war" veteran. N.Y. Civil Service Law § 85(1)(c)(4). Yet, he was still denied the preference under New York's scheme.

membership in the nation." (A 22). Thus, the purpose of benefitting veterans becomes distorted when it serves only to benefit New York's "own" as determined by past residency. Such an end is not legitimate. *Hooper*, 86 L.Ed.2d at 496.

New York's asserted goal of lessening the burden of military service is not at all advanced by the distinctions it has made in favor of veterans who were inducted from New York. Veterans may differ in the actual burdens they have suffered when they have "been obliged to drop their own affairs to take up the burdens of the nation". *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). These differences however are personal; they do not turn on the veteran's State of residence when he or she enters the armed services. As this Court held in *Hooper*, there is no uniqueness attached to veterans who enter the armed services from a particular State:

> Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service.

Hooper, 86 L.Ed.2d at 495.

The purposes of compensating veterans for their services and lessening their burdens of re-entry into civilian life are not rationally related to the distinctions based on the past residences of these veterans. When the benefits turn solely on past residence, they do not serve a legitimate state purpose. *Id.* at 496.

2. *Encouraging Veterans To Settle In New York And Enter The Civil Service*

New York's asserted purpose of encouraging veterans to settle in the State and enter the civil service is a legitimate state interest. New York has decided instead to selectively encourage only its veterans, who were residents of the State when they

entered the armed forces, to return to the State.[17] This favoritism, based purely on past residency, is unconstitutional. This Court in *Hooper* settled the same question:

> Although neither appellee nor the State of New Mexico presses the point, the statute could . . . plausibly encourage certain veterans, who had once resided in New Mexico prior to May 8, 1976, to return to the State. This selective incentive, however, would encounter the same constitutional barrier faced by the statute's distinction between past and newly-arrived residents.

Hooper, 86 L.Ed.2d at 494 n.8.

The Attorney General argues for the first time in this Court that New York has a special interest in encouraging only its own past residents to return and not veterans from other states. He acknowledges that veterans generally would make excellent public servants. Brief of Appellant, p.30. But now he asserts that veterans who enter the service from New York "presumably have acquired knowledge of the local environment—its governmental workings, its people and their problems—which non-residents would not have been exposed to and would not possess." *Id.*[18] This added knowledge is

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17. New York's scheme obviously does not encourage all veterans to reside in New York—the majority would not qualify for the preference. "The separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." *Hooper*, 86 L.Ed.2d at 494 (quoting *Zobel*, 457 U.S. at 62 n.9).

18. The Attorney General's presumption about the correlations between residence and knowledge of the local environment and, thus, ability to serve in the civil service are no where in the record and just cannot be substantiated. Even if residence relates to knowledge of the local environment, that knowledge does not make anyone a better "housing caretaker," the job sought by plaintiff Soto-Lopez or a better "assistant accountant," a job sought by plaintiff Baez-Hernandez. Indeed, the courts have found that "civic awareness" was not a knowledge related to the job of police officer. *Guardians Association* v. *Civil Service Commission*, 431 F.Supp. 526, 544 (S.D.N.Y.), *reversed on other grounds*, 562 F.2d 38 (2d Cir. 1977). The constitutionality of these provisions cannot be sustained upon the unsupported presumptions of the Attorney General.

measured, under the New York scheme, exclusively by past residence. Those persons who established their residence in the State before they entered the armed forces "presumably" have it and are rewarded. Those who moved to New York after entering service can never qualify. This State purpose of "favoring established residents over new residents is constitutionally unacceptable". *Zobel*, 457 U.S. at 65, (quoting *Vlandis* v. *Kline*, 412 U.S. 441, 450 (1973).

The clear impact of the Attorney General's argument is seen when the veteran's trappings are removed. He argues that past residents make better civil servants and, therefore, the State can discriminate in favor of past residents over newer ones. Presumably, the longer the residence, the greater the knowledge of the State, and therefore, the better the civil servant. Under this rationale, points could be distributed based on the years of residency. The illegitimacy of such a program and the distinctions it creates are clear. *Zobel*, 457 U.S. at 65; 457 U.S. at 71 (Brennan, J., concurring).

Finally, even if this attribute were considered acceptable under the Constitution, the distinction New York makes is irrational because it permanently excludes all newcomers—no matter how long they reside in the state. Long time residents of the State of New York who entered the armed services from elsewhere are permanently excluded from the preference. Like the individuals described by the Attorney General above, they have been "exposed" to the "local environment."[19] However, their past residence permanently excludes them from the benefits New York offers. Conversely, the veteran preference is equally irrational when it grants bonus points to the veteran who established residency only one day before his or her induction. That veteran would receive the preference but can hardly be deemed to have acquired in one day that knowledge

19. The plaintiffs themselves are prime examples. Plaintiff Soto-Lopez had lived in New York for 15 years at the time he took the civil service test. Similarly, plaintiff Baez-Hernandez had been a New York resident for 12 years when he took the examination. (JA 25, 23). Each of them was a veteran at that time.

of the local environment that the Attorney General now views as an attribute which New York seeks to reward.

3. *Encouraging Service In The Armed Services*

The Attorney General recognizing the weakness of his arguments in regard to the other purported purposes[20] emphasizes on this appeal the State's interest in encouraging service in the armed forces. The emphasis is misplaced as this interest is no more related to the distinctions the State creates between veterans than any of the other asserted interests.

The first purpose discussed in the Brief was the State's interest in compensating veterans for the service they had performed. That purpose is no different from "encouraging service in the armed forces" where the encouragement is a promise that after being honorably discharged from war time service, there will be a compensation. Both purposes bear no relationship to the State of residence prior to the service. It is the service that is being rewarded not where the veteran lived before the service. To base the compensation for the service simply on prior residence is not a legitimate state purpose.

The reasoning of the Court in *Hooper* is equally appropriate here:

> The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for their "past contributions" toward our nation's military effort in Vietnam. *Zobel* teaches that such an objective is "not a legitimate state purpose." 457 U.S. at 63, 72 L.Ed.2d 672, 102 S.Ct. 2309. The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976. See,

20. Brief of Appellant, p. 23.

> e.g., *Vlandis* v. *Kline*, 412 U.S. 441, 449-450, and n 6, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1973); *Shapiro* v. *Thompson*, 394 U.S. at 632-633, 22 L.Ed.2d 600, 89 S.Ct. 1322; *Passenger Cases*, 7 How 283, 492, 12 L.Ed. 702 (1849) (Taney, C.J., dissenting).

Hooper, 86 L.Ed.2d at 496. As in *Hooper*, the sole distinction between plaintiffs and favored veterans is past residence. Because plaintiffs joined the service in Puerto Rico, they can never obtain the benefits of veterans who New York calls its own.

The Court of Appeals also found that this asserted purpose was not legitimate, but in other terms:

> Nor can the state's desire to express its own patriotism by encouraging its residents to serve the nation in time of need justify the challenged favoritism toward its own residents, for the nation could not survive on the strength of services of individuals from a single state. Thus, while a state's patriotism is exhibited by its encouragement of its residents to do their part, patriotism also requires recognition that their part is not the whole. The State thus does not have a legitimate interest in encouraging *only* its own residents to perform military service.

(A 24-25) [Emphasis in original].

Thus, the State can justifiably encourage service in the armed forces by offering a compensation for that service. However, it cannot differentiate among its present residents who did serve solely on their past or prior residency in the State. This Court found in *Hooper*, that New Mexico's statute may have encouraged some Vietnam veterans to move to the State. *Id*. 86 L.Ed.2d at 494 n.8. This was a seemingly legitimate state purpose, although the Court did not rule on this issue. The Court, nevertheless, found that simply because the statue may have served this purpose, it could not overcome the "constitutional barrier" against providing benefits based solely on prior residence. *Id*. Here, even if New York's provisions do encourage service in the armed forces, the distinctions

they make between those who served based on prior residence cannot withstand scrutiny under the Equal Protection Clause.

Faced with a purpose that is neither rationally served by the State's provisions nor legitimate under *Zobel* and *Hooper*, the Attorney General has developed a new "purpose" for this appeal. He now argues that the State is only interested in encouraging the enlistment of persons into the armed forces. The State is so interested, in fact, that the Attorney General now asserts that these veteran provisions act to encourage non-residents to move to New York to enlist. Thus, it is not the service in the army that is being compensated and encouraged, but just the enlistment in the armed forces. The linchpin of the Attorney General's argument is his claim that the benefits "vest" at the time of enlistment. He argues that since the benefit is given at the time of enlistment, residence in the State is important and rationally related to the benefit.

The Attorney General's own statement of the proposition contradicts his assertion:

> Any individual who is a resident of New York on the date of entry into the armed service qualifies [for veteran preference] whether he or she has been a resident of the State for a day or a decade. As of that date, the resident's right to future veteran credit *vests*, provided two other criteria are satisfied, service in time of war and discharge under honorable circumstances.

Brief of Appellant, p. 26 [Emphasis added]. Veteran credits cannot both "vest" and be subject to other conditions.[21]

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21. For example, New York estate law defines future estates as ones, *inter alia*, which are indefeasibly vested and ones which are subject to a condition precedent. N.Y. Estates, Powers and Trusts Law, § 6-3.2(a)(2) (A) and (D), § 6-4.7 and § 6-4.10. *In re Van Aukens Estate*, 31 N.Y.S.2d 897, 899-890 (Sur.Ct. 1941) ("A future estate is either vested or contingent. It is vested when there is a person in being, who would have an immediate right to the possession of the property . . . It is contingent while the person to whom, or the event on which it is limited to take effect, remains uncertain.")

The veteran preference vests, as New York law makes clear, when all the conditions are met:

1) service during the "time of war;"
2) honorable discharge;
3) passing a civil service examination;
4) application for veteran credits before an eligibility list is established;
5) current residency in New York; and,
6) New York residency at the time of enlistment.

New York Constitution, art. V, § 6; New York Civil Service Law § 85. In the words of the Attorney General in 1946, "honorable discharge or release [from the armed forces] is a necessary condition precedent to obtaining the preference." 1946 N.Y. Attorney General Opinions 156, 159. Thus, contrary to the Attorney General's claim, veteran preference credits do not vest upon enlistment which is only one of the criteria for entitlement.[22]

Since the benefits of New York's provisions do not vest upon enlistment, one's residence on that date bears no rational relationship to the provisions. What state interest is served in

22. The fallacy of the Attorney General's "vesting" argument is demonstrated by the facts in *Neville* v. *Bronstein*, 77 Misc.2d 716, 354 N.Y.S.2d 567 (N.Y. Sup. Ct. 1974). In April 1951, the New York State legislature amended the civil service law to add a new "time of war" provision to cover the Korean War. The legislature retroactively set June 25, 1950 as the starting date for this time of war but set no end date. Act of Apr. 3, 1951, Ch. 505, 1951 N.Y. Laws 1259. The petitioners in *Neville* entered the armed forces between September, 1953 and September, 1957. The legislature then in April, 1958 retroactively set the end date of the "time of war" for the Korean War as July 27, 1953. In 1974, the court in *Neville* determined that petitioners had not served in "time of war," based on the end date that the legislature had set retroactively, and, therefore, were not entitled to the veteran's preference. If the Attorney General were correct that the preference vests at time of enlistment, petitioners should have prevailed since when they enlisted the end date of the Korean War had yet to be established. Ironically, two years after the court decision, the legislature again retroactively amended the statute and set the end date for the Korean war as January 31, 1955. Act of June 8, 1976, ch. 313, 1976 N.Y. Laws 840.

encouraging enlistment other than to provide for the "common defence."[23] Having served in the nation's armed forces, plaintiffs are equally entitled to share in the benefits based on that service.

The language and intent of the constitutional and statutory veteran preference provisions simply do not support the new argument. If the State wanted to simply provide a benefit for enlistment that vested, it knew how. During the Civil War the State provided bonuses to those who volunteered. Act of Feb. 21, 1863, ch.14, 1863 N.Y. Laws 18. The present provisions do not speak about the "enlistee" and his or her rights, but only those who "served." The constitutional provision provides the benefits for "any member of the armed forces of the United States who served therein in "time of war." New York Constitution, art. V, § 6. Similarly, the statutory provision does not define "enlistee" but rather defines "veteran," in the same terms as those in the New York Constitution. New York Civil Service Law § 85(1)(a). The only reference to enlistment is the requirement that the veteran was a resident of the State at time of entrance into the armed forces. If the purpose of these provisions was to vest some benefit in enlistees, one would expect that this purpose would be evident from the language; it simply is not.

Similarly, the language of these provisions does not differentiate between volunteers who enlist and draftees. Both are entitled to the preference as long as the other conditions are met. If the provisions were to vest an important benefit simply for enlisting, one would expect that volunteers and draftees would be treated differently.[24]

23. Preamble, United States Constitution.

24. Ironically, the Selective Service Act is now being touted as another factor in support of New York's interest in encouraging its residents to enlist in the armed forces in time of war. Brief of Appellant, pp. 23-24. As was demonstrated above, New York has an interest in not only its residents serving in the armed forces but residents from all the States. Indeed, the provisions relied on by the Attorney General do just that. Section 5(b) of the Selective Service Act sets out methodology for establishing draft quotas for all the States. 50 U.S.C. app. § 455(b). What is peculiar about the Attorney

Finally, if the benefit were meant to vest upon enlistment, one would expect that the provisions would apply only to those who enlist at the time of war. However, veteran credits are provided to anyone who "served" in time of war. Thus, those who enlisted years before the war and whose tours of duty extend into the "time of war" are covered. Similarly, veterans who left active duty before a war and are reactivated from reserve status during a war are covered. These veterans, like the draftees, have not been encouraged to enlist by New York's provisions, yet they receive the benefit because they "served" during the time of war and were honorably discharged.

Furthermore, the provisions at issue are not rationally related to encouraging enlistment and service in the armed forces because to a large extent they were enacted retroactively. The legislation followed the pattern found in *Hooper.*[25] In *Hooper,*

General's reliance is that the quotas are for those who have to be drafted by each State after account is taken for those who voluntarily enlist. Contrary to the State's assertion, this provision creates no federal impetus on New York or other States to encourage its residents to volunteer. Rather it establishes how many residents each State must draft. Taken to its logical extension, the only benefit New York would receive by allegedly encouraging non-residents to travel to the State and enter the armed forces (See, Brief of Appellant, p. 32) would be a decrease in the number of New York residents that would be drafted under the quota established under the Selective Service Act. The State could not plausibly argue that this interest is legitimate.

25. The legislative history was set out in a footnote:

> The initial statute extending an exemption to Vietnam veterans required that the veteran have been a New Mexico resident before "entering the armed services from New Mexico" and also that the veteran have been "awarded a Vietnam campaign medal for services in Vietnam" during a prescribed period. 1973 NM Laws, Ch 258, p 1052. In 1975, the state legislature eliminated the medal requirement but retained the condition that the veteran have entered the armed forces from the State. 1975 NM Laws, Ch 3, p 11.
>
> In 1981, the legislature dropped the requirement that the veteran have entered the military from New Mexico. The new statute extended the tax exemption to any Vietnam veteran who "was a New Mexico resident prior to . . . May 8, 1975." 1981 NM Laws, Ch 187, p 1078. In 1983, the statute was amended to provide the exemption to any Vietnam veteran "who was a New Mexico resident prior to . . . May 8, 1976." 1983 NM Laws, Ch 330, p 2112.

Hooper, 86 L.Ed.2d at 491 n.2.

New Mexico granted property tax exemption benefits to veterans who had established residence before May 8, 1976. The Court found that establishment of this cut-off date in 1983 bore no rational relationship to the State's proclaimed objective of encouraging veterans to move to the state. *Hooper,* 86 L.Ed.2d at 494. Since the establishment of the cut-off date was done retroactively, the legislation may have discouraged veterans who were too late for the deadline. *Id.*

New York's legislation suffers from the same retroactivity as the New Mexico legislation. Retroactivity is not itself impermissible under the Equal Protection Clause; it simply, in this case as in *Hooper,* belies any claim that the provisions are rationally related to encouraging some act that occurred in the past. The legislative history of New York's veteran preference provisions evidences a series of retroactive legislative enactments that are similar to the actions of the New Mexico legislature.

The modern day civil service provisions began soon after the Second World War.[26] In 1946, New York amended its Constitution and Civil Service Laws to provide benefits to all veterans who served during times of war. New York Constitution, art. V, § 6 (1945) (Brief of Appellant at S-4); Act of Apr. 15, 1946, ch. 521, 1946 N.Y. Laws 1155. The provisions were clearly retro-

26. The earliest legislation of this type was passed after the Civil War to benefit Union veterans. See, e.g. Act of May 29, 1884, ch.410, 1884 N.Y. Laws 487. Similar legislation was passed after World War I. Act of May 12, 1921, ch.702, 1921 N.Y. Laws 2483 (set out at Brief of Appellant, S-1). Like the current legislation it only benefitted those who served in time of war, thus extending coverage to World War I veterans, as well as veterans from prior wars.

In 1929, the New York State Constitution, Article V, Section 6, was amended to provide benefits only to *disabled* veterans. (See Brief of Appellant, S-3, for text). The constitutional amendment was incorporated into legislation in 1930. Act of Apr. 8, 1930, ch. 374, 1930 N.Y. Laws 795. It can not be argued that this new legislation that required an individual to not only serve during the time of war, but be disabled as well, was an act to encourage enlistment. The purpose clearly was to provide some benefit to those injured at war. This provision stayed in effect until amended after World War II.

active coming after the end of the war. While the provisions covered veterans serving in "times of war" generally, it had no prospective effect as the World War II was the last declared war. Thereafter, legislation was required to define the "time of war," both the beginning date and the end date, and in each instance the amendments were retroactive.

The New York State legislature amended the statute to cover the Korean War almost a year after it began. On April 3, 1951, the Civil Service Law was amended to add a new "time of war" definition to cover "Hostilities participated in by the military forces of the United States subsequent to June twenty-fifth, nineteen hundred fifty." Act of Apr. 3, 1951, ch. 505, 1951 N.Y. Laws 1259. The legislature, on April 15, 1958, retroactively amended the statute to include July 27, 1953 as the end date. Act. of Apr. 15, 1958, ch. 790, 1958 N.Y. Laws 943. The end date was retroactively amended again to January 31, 1955 by legislation in 1976. Act of June 8, 1976, ch. 313, 1976 N.Y. Laws 840.

The pattern of retroactive legislation is repeated for the Vietnam War. On August 1, 1966, the "time of war" provision was amended to add the fighting in "southeast Asia" with the beginning date stated as January 1, 1963. Act of Aug. 1, 1966, ch. 908, 1966 N.Y. Laws 2695. As with the Korean War the end date was the subject of several retroactive amendments. On June 11, 1973, the end date was set as March 29, 1973. Act of June 11, 1973, ch. 694, 1973 Laws of New York 2267. This date was amended in 1983 to be May 7, 1975. Act of June 3, 1983, ch. 219, 1983 Laws of New York 415.

Thus, these provisions like those in *Hooper* were retroactive. The retroactive delay in setting the starting dates for the time of war belie claims that the provisions were rationally related to encouraging residents to enlist. More importantly, the retroactive setting and amendment of the end periods had, if anything, a discouraging effect. For example, residents were told by New York's legislature on June 11, 1973 that from

March 29, 1973 on there would be no benefits for serving in the armed forces since the "time of war" was over. However, in 1983, the end date was retroactively amended to May, 1975. Thus, since 1983, New York has benefited even those that it discouraged.

B. Conclusion

New York's veteran provisions violate the Equal Protection Clause. As the Court of Appeals found, the distinction between classes of resident veterans is not rationally related to the purposes asserted by the Attorney General. Once all the justifications are stripped away, it is evident that the purpose is to reward some veterans based on past residence. This Court has held, now on two occasions, that this is not a legitimate state purpose. *Hooper*, 86 L.Ed.2d at 496; *Zobel*, 457 U.S. at 63.

II.

NEW YORK'S VETERAN PREFERENCE PROVISIONS VIOLATE PLAINTIFFS' CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL

New York's veteran preference system treats newly migrated resident veterans differently from other resident veterans in violation of the constitutional right to travel. "[A] resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State." *Hicklin* v. *Orbeck*, 437 U.S. 518, 525 (1978) (interpreting *Ward* v. *Maryland*, 12 Wall 418, 20 L.Ed. 449 (1871)).

The right to travel is fundamental to the Constitution. *Shapiro* v. *Thompson*, 394 U.S. 618, 630-631 (1969). New York's provisions strike at the heart of the Constitution by seeking to benefit its residents who can demonstrate past ties to the State over newly migrated residents. The Preamble to the Constitution proudly announces:

> WE THE PEOPLE of the United States, in Order *to form a more perfect Union*, establish Justice, insure domestic Tranquility, *provide for the common defence*, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

[Emphasis added]. When the right to travel is penalized, that "more perfect Union" is jeopardized. When one state treats veterans as only "its own," rather than the nation's, it makes a mockery of the "common defence."

The constitutional source of the right to travel has been ascribed to numerous constitutional provisions.[27] But regardless of the source, this Court has been its ardent protector.

Plaintiffs' right to travel has been burdened through New York's preference for its own residents who can show earlier

27. The Court in *Shapiro* v. *Thompson*, 394 U.S. at 630 n.8, reviewed those sources:

> In *Corfield* v. *Coryell*, 6 F Cas 546, 552 (No. 3230) (CCED Pa 1825), *Paul* v. *Virginia*, 8 Wall 168, 180, 19 L.Ed.357, 360 (1869), and *Ward* v. *Maryland*, 12 Wall 418, 430, 20 L.Ed.449, 452 (1871), the right to travel interstate was grounded upon the Privileges and Immunities Clause of Art IV, § 2. See also *Slaughter-House Cases*, 16 Wall 36, 79, 21 L.Ed. 394, 409 (1873); *Twining* v. *New Jersey*, 211 U.S. 78, 97, 53 L.Ed. 97, 105, 29 S.Ct. 14 (1908). In *Edwards* v. *California*, 314 U.S. 160, 181, 183-185, 86 L.Ed. 119, 129-132, 62 S.Ct. 164 (1941) (Douglas and Jackson, JJ. concurring), and *Twining* v. *New Jersey*, *supra*, reliance was placed on the Privileges and Immunities Clause of the Fourteenth Amendment. See also *Crandall* v. *Nevada*, 6 Wall 35, 18 L.Ed. 745 (1868). In *Edwards* v. *California*, *supra*, and the *Passenger Cases*, 7 How 283, 12 L.Ed. 702 (1849), a Commerce Clause approach was employed. See also, *Kent* v. *Dulles*, 357 U.S. 116, 125, 2 L.Ed.2d 1204, 1210, 78 S.Ct. 1113 (1958); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-506, 12 L.Ed.2d 992, 996, 997, 84 S.Ct. 1659 (1964); *Zemel* v. *Rusk*, 381 U.S. 1, 14, 14 L.Ed.2d 179, 188, 85 S.Ct. 1271 (1965), where the freedom of Americans to travel outside the country was grounded upon the Due Process Clause of the Fifth Amendment.

And see, *Zobel*, 457 U.S. at 79 (O'Connor, J., concurring in the judgment) finding the source in Article IV of the Articles of Confederation as carried forward in the Privileges and Immunities Clause of Article IV of the Constitution.

ties to the State. *Zobel*, 457 U.S. at 76 n.6 (O'Connor, J., concurring in the judgment) ("The 'burden' imposed on non-residents is relative to the benefits enjoyed by residents."). The burden is substantial. The award of veteran credits can mean the difference between being employed or being unemployed.[28] In *Andrade* v. *Nadel*, 477 F. Supp 1275 (S.D.N.Y. 1979) the Deputy Director of the New York City Department of Personnel[29] submitted an affidavit which stated:

> "[O]n most civil service examinations, there is a pronounced 'bunching' (i.e., a large percentage of the test takers obtain very similar scores) [and] it can be assumed that rescission of the five or 10 point veterans' preference in the case of most of 1,300 employee [veterans receiving probationary appointments in New York City alone during the past year will] result in their receiving a list number that has not yet been reached for appointment, and that consequently they will lose their jobs.

Id. at 1279. The plaintiff there lost 5 points and went from number 3,556 on the eligible list to number 9,145 on the list. The Second Circuit Court of Appeals in *Guardians Association of New York City* v. *Civil Service Commission of the City of New York*, 630 F.2d 79 (2d Cir. 1980), *cert. den.*, 452 U.S. 940 (1981) noted the same bunching in scores. *Id.* at 103. The bunching was so pronounced in that case that for every score between 92 and 97, there were 2000 or more candidates. *Id.* at 103 n.20. Thus, for plaintiffs as for others, the veteran credits can mean employment and the launching of a career or it can mean unemployment.

28. Unemployment is a serious problem for Vietnam era veterans. ". . . [I]n January, 1983, over 883,000 veterans were looking for work. The rate of unemployment for Vietnam era veterans, 25 to 29 years old, was a staggering 21.8 percent. Non veteran males in the same age group were unemployed at a much lower rate of 13.7 percent." Hearing Before the Subcommittee on Education, Training and Employment of the Committee on Veteran's Affairs, House of Representatives, 98th Cong., 1st Sess., February 23, 1983 at p.2.

29. The New York City Department of Personnel is a defendant in this case but did not appeal the judgment of the Court of Appeals.

Employment in a civil service position carries substantial benefits including job security, freedom from arbitrary dismissals, hospital and medical insurance, pensions, and decent pay. More importantly, the effects of the veteran preference go well beyond the date of initial hire. Section 85 of the Civil Service Law, also provides an additional 30 months seniority to veterans (60 months to disabled veterans) at times of lay-off or the elimination of positions. New York Civil Service Law § 85(7). Thus, veteran status not only can accelerate the date of hire, but also can protect against lay-off. The veteran preference provisions apply to all competitive civil service positions in the state from non-professional to professional titles.

The veteran preference applies not only at the time of hire but also on promotions. Plaintiffs and other disfavored veterans, even if hired, have to compete at a disadvantage every time they seek a promotion. This disfavored status is permanent regardless of how long they remain residents of New York.

Thus, plaintiffs are at a decided disadvantage in seeking civil service employment, maintaining civil service employment at times of lay-off and being promoted in civil service jobs. Their right to travel has been more severely penalized than plaintiffs in *Zobel* and *Hooper*. The difference of being employed in a civil service job for only one year as opposed to being unemployed means substantially more in economic terms than the $2,000 property tax exemption in *Hooper*[30] and the $50 per year of residency income redistribution in *Zobel* could mean over many years. Moreover, the non-economic advantages of just being employed in a secure job with ample fringe benefits

30. The Attorney General argues that the property tax exemption in *Hooper* would be worth $5,000 after 20 years. Brief of Appellant, p. 34 n.21. While there can be no exact measure of the economic value of any particular civil service position, one year of unemployment or one year delay in obtaining a promotion is greater than the 20 years of benefits in *Hooper*.

and generous retirement provisions far outweigh a property tax exemption and $50 payments.[31]

When this fundamental right, the right to travel, is burdened by state action, the Court must scrutinize very closely the justifications for the State's action. *Zobel*, 457 U.S. at 66 n.1 (Brennan, J., concurring). Whether a showing of compelling state interest is required under the Equal Protection Clause, *Shapiro* v. *Thompson*, 394 U.S. at 627; or whether under the Privileges and Immunities Clause, the two part-test must be satisfied, *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in the judgment); or whether under a balancing test, the State's interest must outweigh the burden on the right to travel, *Jones* v. *Helms*, 452 U.S. 412, 427 (1981) (White, J., concurring), these veteran provisions cannot be justified.

A. Equal Protection

New York's veteran preference provisions are akin to durational residency requirements. Durational residency requirements establish two classes of residents, those newly arrived and those with usually a year or more of state residence. *Shapiro*, 394 U.S. at 627. The provisions here create an even more invidious distinction because the classes are permanent—those resident veterans who were New York residents at the time of entrance into the armed forces and those resident veterans who settled in New York after they entered the armed forces. This invidious discrimination which penalizes the right to travel requires the Court to apply the compelling-state-interest analysis. *Id*.

31. The Attorney General argues that the benefits are so insubstantial that they cannot influence travel. Brief of Appellant, p. 33. However, earlier in his brief he argues that the State provides these benefits to encourage its veterans to return to the State and even to encourage persons to move to the State to enlist. *Id*. at 29, 32. If the benefits are sufficiently large in the Attorney General's opinion to encourage individuals to return or move to New York, the absence of these benefits cannot be said to be so insubstantial as not to affect travel.

In *Shapiro*, Connecticut, Pennsylvania and Washington, D.C. had established a one year durational residency requirement for the receipt of welfare assistance. Newly arrived needy residents were denied these benefits until they had been in the State or District for at least a year. The Court found that these distinctions between residents could not be justified by a compelling state interest and, thus, violated right to travel as encompassed in the Equal Protection Clause. *Id.* 394 U.S. at 638.

The *Shapiro* decision was followed by similar decisions in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974). In *Dunn*, Tennessee imposed a one year state residency requirement on the right to register to vote. In *Memorial Hospital*, one year of county residence was required for free non-emergency hospitalization or medical care in Maricopa County. Applying a compelling-state-interest analysis, the Court found that these durational residency requirements violated the right to travel as encompassed in the Equal Protection Clause.

A fourth durational residency case, *Sosna* v. *Iowa*, 419 U.S. 393 (1975) distinguished the holdings in *Shapiro*, *Dunn*, and *Memorial Hospital* and upheld an Iowa provision requiring residence in the State for one year to establish jurisdiction to obtain a divorce. The Court in *Sosna* noted that the defendant States in *Shapiro*, *et al.*, sought to justify their requirements on budgetary and bookkeeping grounds. In *Shapiro*, the defendants sought to limit their welfare expenses by providing them only to longer term residents and further argued, *inter alia*, that the one-year residency requirement was needed to insure bona fide residence. *Shapiro*, 394 U.S. at 627, 634. In *Dunn*, the justification again was primarily to insure that voters were bona fide residents, and thus, avoid fraudulent voting by non-residents. *Dunn*, 405 U.S. at 345. Finally, in *Memorial Hospital*, the justification was again monetary and record keeping. *Memorial Hospital*, 415 U.S. at 263. The Court in *Sosna* noted that these justifications were clearly outweighed by the infringements on the right to travel. *Sosna*, 419 U.S. at

406. Conversely, in *Sosna*, the State of Iowa was found to have justifications much more substantial than budgetary and bookkeeping. Iowa, and other States, had the absolute right to determine the conditions upon which marriages would be made or dissolved. *Id.* at 404. Concommitant with that right was the obligation to insure that decrees that affected the family and particularly the children were issued only when the parties had a "modicum of attachment to the State." *Id.* at 406-407. Finally the State had an interest in insuring that its divorce decrees would be upheld and that sufficient domicile had been established. *Id.* at 408. While not reaching whether a compelling-state-interest test or other type of Equal Protection scrutiny was being applied, the *Sosna* court found the substantial interests of Iowa outweighed any claims of the right to travel.

When the distinctions between newly migrated residents and residents with longer or prior residencies was confronted again in *Zobel* and *Hooper*, this Court again adopted the Equal Protection analysis. *Zobel*, 457 U.S. at 60-61; *Hooper*, 86 L.Ed.2d at 493. However, while noting that the compelling-state-interest test may apply, the Court needed only the most minimal scrutiny to find that the distinctions between residents could not be justified.

In Point I of this brief, plaintiffs have demonstrated that, using the reasoning and scrutiny applied by the Court in *Hooper* and *Zobel*, New York's veteran provisions cannot be justified under the Equal Protection Clause. New York, *a fortiori*, cannot meet the compelling-state-interest test required by *Shapiro*, *Memorial Hospital* and *Dunn*. Nor has New York demonstrated the kind of interest shown by Iowa in *Sosna*. New York has no substantial interest in treating "its" veterans any differently then veterans who settled in New York from other states. As Justice O'Connor stated in *Zobel*, ". . . persons who migrated to Alaska may have contributed significantly more to the State, both before and after their arrival, then have some natives." *Zobel*, 457 U.S. at 78 (O'Connor, J., concurring in the judgment). Similarly, here, veterans from the

other States and territories who after the service have moved to New York, may have done more for New York both as soldiers in the armed forces and now as residents of the State, than New York's own resident veterans may have done. Any level of heightened scrutiny under the Equal Protection Clause finds wanting New York's interest in benefitting only its own.

B. The Privileges And Immunities Clause Of Article IV Of The Constitution

New York's veteran preference violates the right to travel incorporated in the Privileges and Immunities Clause of Article IV of the Constitution. *Zobel*, 457 U.S. at 71 (O'Connor, J., concurring in the judgment). Veterans who were non-residents at the time of induction are enjoying less privileges than veterans who are lifelong New York residents. As this Court has held, the Privileges and Immunities Clause of Article IV "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer* v. *Witsell*, 334 U.S. 385 (1948) [Footnote omitted].

The right to travel, "the right infringed in this case [,] is 'fundamental'. [New York's veteran preference] burdens those nonresidents who choose to settle in the State." *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in the judgment) [Footnote omitted]. The "burden" imposed is the relative benefits received by veterans who are "new" residents to the State such as plaintiffs compared with veterans who were residents of the State when they were inducted into the army. *Id.* at 76, n.6. The benefits of a civil service career are certainly covered by the Privileges and Immunities Clause. *United Building and Construction Trades Council of Camden County and Vicinity* v. *Mayor and Council of the City of Camden*, ___ U.S. ___, 79 L.Ed.2d 249 (1984); *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978); *Ward* v. *Maryland*, 12 Wall 418, 20 L.Ed.449 (1871). Plaintiffs are entitled to engage in this "essential activity" without any distinction based on prior residence. *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in the judgment).

Where a fundamental right or essential activity is burdened, the Privileges and Immunities Clause imposes a two-part test to determine the constitutionality of the discrimination.

> First, there must be " 'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.' " . . . Second, the Court must find a "substantial relationship" between the evil and the discrimination practiced against non-citizens.

Id. [citations omitted]. New York cannot satisfy this test; indeed, the Attorney General has not even addressed it.

New resident veterans obviously pose no threat to the civil service system. New York has lauded the qualities of veterans generally, it cannot argue that veterans from Puerto Rico, like plaintiffs, do not share in these same qualities. Moreover, newly migrated veterans are no threat to the public fisc;[32] civil service jobs have to be filled whether by veterans, new residents and old alike, or by non-veterans. The State's budget is not involved. Thus, New York cannot satisfy even the first part of the test.

Nor, can the State satisfy the second part of the test. Even if newly migrated veterans were a source of evil, the provisions bear little relationship to any cure for this evil. Resident veterans who migrated to the State after entering the armed forces are not barred from civil service employment. Moreover, if one looks at the interests that the Attorney General asserts are the purposes of the provisions, none bears a "substantial" relationship to excluding newly migrated veterans from the preferences. As was demonstrated in Point I, none of these purposes is even rationally related to the distinction between residents who were inducted into the armed forces from New

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32. Legislation seeking to benefit older residents over newly migrated residents usually is enacted to preserve the economic resources of the state for those who contributed to it in the past. See, e.g. *Shapiro* v. *Thompson*, 618 U.S. at 627; *Memorial Hospital* v. *Maricopa County*, 415 U.S. at 263; *Zobel*, 457 U.S. at 61, and see, similarly, *Hooper*, 86 L.Ed.2d at 499 (Stevens, J., dissenting).

York and residents who were inducted from elsewhere. One of the purposes, "encouraging veterans to settle in New York and enter the State's civil service" completely contradicts any argument that newly migrated veterans are "evil." Moreover, New York seeks to benefit only "its own" veterans for the services they have rendered, yet newly migrated veterans "may have contributed significantly more to the State, both before and after their arrival, than have some natives." *Zobel*, 457 U.S. at 78 (O'Connor, J., concurring in the judgment).

Burdening a fundamental right and an essential activity and failing to meet the two-part test, New York's provisions violate the Privileges and Immunities Clause of Article IV of the Constitution.

C. Balancing Test

As Justice White has stated, the Equal Protection analysis may not lend itself to enforcement of the right to travel. When a fundamental right is involved, the burden on the right to travel varies depending on the benefits withheld. Thus, the level of scrutiny may vary. *Jones* v. *Helms*, 452 U.S. 412, 426-427 (1981) (White, J., concurring); *Vlandis* v. *Kline*, 412 U.S. 441, 456-459 (1973) (White, J., concurring in the judgment). In such circumstances, the Court may want to weigh the interest of the State in creating distinctions among its residents against the interest in the right to travel which is being denied. *Id.*

Here, the individual interest of a newly migrated veteran in obtaining civil service employment[33] outweighs the interest of only benefiting veterans who were inducted as New York residents. The Attorney General has put forth no legitimate interest in "maintaining the bizarre pattern of discrimination" among New York's residents. *Vlandis*, 412 U.S. at 459 (White, J., concurring in the judgment). Plaintiffs Soto-Lopez and

33. A civil service career is as substantial or more substantial than the interest in obtaining a college education. *Vlandis* v. *Kline*, 412 U.S. at 459 (White, J., concurring in the judgment).

Baez-Hernandez have been New York residents since 1965 and 1968 respectively. (JA 25, 23). Yet, for no reason, they are treated differently from residents who may have moved to New York after those dates and entered the armed forces.[34] The bizarre nature of this discrimination is highlighted by the treatment of Mr. Baez-Hernandez. He was honorably discharged from active duty in 1960 and was on reserve status for the army when he moved to New York in 1968. (JA 23). In 1970, while a New York resident, he was called for active duty and was disabled while on active duty. It was this service in 1970 that qualifies him as serving during a "time of war." Despite the fact that he was a New York resident when he was recalled for active duty in 1970, he is treated differently from other veterans who were residents of New York when they enlisted for the *first* time in 1970 or even 1975. These beneficiaries of New York's veteran preference may have moved to New York at any time prior to their enlistment and may have many years less residency in New York than Mr. Baez-Hernandez.

The interest in the right to travel surely outweighs the State's interest in maintaining this invidious discrimination against its residents.

D. Conclusion

The fundamental nature of the right to travel requires the Court to look closely at distinctions based on prior residence. Whether under the Equal Protection Clause analysis, or under the Privileges and Immunities two-part test or by way of a balancing test, New York must have a substantial interest in the distinctions that it has created, and the provisions that create those discriminatory classes must be closely related to that interest. New York has not met its burden. Plaintiffs' constitutional right to interstate travel has been violated.

34. Any resident veteran who entered the armed services from New York from January 1, 1963 to May 7, 1975 is covered by the veteran preference provisions. N.Y. Civil Service Law § 85(1)(c)(4).

III.

THE DECISION IN *AUGUST* v. *BRONSTEIN*, HAS BEEN OVERRULED BY *ZOBEL* v. *WILLIAMS* AND *HOOPER* v. *BERNALILLO COUNTY ASSESSOR*

The case of *August* v. *Bronstein*, 369 F.Supp. 190 (S.D.N.Y.) (three judge court), *aff'd mem.*, 417 U.S. 901 (1974) resolved the same questions presented here. This Court summarily affirmed the finding that these provisions did not violate the Constitutional guarantees of equal protection and travel. However, because *August* involved a summary affirmance, it does not have the same precedential value in this Court as a written opinion issued after full consideration. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Richardson* v. *Ramirez* 418 U.S. 24, 83 n.27 (1974) (Marshall, J., dissenting). *Cf. Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976). In addition, as this Court recently emphasized, the summary affirmance in *August* "may not be read as an adoption of the reasoning of the judgment under review." *Hooper*, 86 L.Ed.2d at 495 n.11.

Points I and II above, demonstrate that New York's veteran preference violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution and the constitutionally protected right to travel. The district court opinion in *August* cannot be reconciled with the Court's decisions in *Zobel* and *Hooper*. These subsequent decisions have effectively overruled the summary affirmance in *August* to the extent it was based on the reasoning of the district court.

CONCLUSION

For all the reasons stated above this Court should affirm the judgment of the Court of Appeals.

Dated: New York, New York
November 1, 1985

Respectfully submitted,

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STATUTORY APPENDIX

N.Y. Civil Service Law § 85 (Consol. 1982 & Supp. 1984-85)

1. Definitions.

(a) The terms "veteran" and "non-disabled veteran" mean a member of the armed forces of the United States who served therein in time of war, who was honorably discharged or released under honorable circumstances from such service, who was a resident of this state at the time of entrance into the armed forces of the United States and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States at the time of application for appointment or promotion or at the time of retention, as the case may be.

(b) The term "disabled veteran" means a veteran who is certified by the United States veterans' administration or a military department as entitled to receive disability payments upon the certification of such veterans' administration or a military department for a disability incurred by him in time of war and in existence at the time of application for appointment or promotion or at the time of retention, as the case may be. Such disability shall be deemed to be in existence at the time of application for appointment or promotion or at the time of retention, as the case may be, if the certificate of such veterans' administration shall state affirmatively that such veteran has been examined by a medical officer of such veterans' administration on a date within one year of either the date of filing application for competitive examination for original appointment or promotion or the date of the establishment of the resulting eligible list or within one year of the time of retention, as the case may be; that at the time of such examination the war-incurred disability described in such certificate was found to exist; and that such disability is rated at ten per centum or more. Such disability shall also be deemed to be in existence at such time if the certificate of such veterans'

administration shall state affirmatively that a permanent stabilized condition of disability exists to an extent of ten percentum or more, notwithstanding the fact that such veteran has not been examined by a medical officer of such veterans' administration within one year of either the time of application for appointment or promotion or the date of filing application for competitive examination for original appointment or promotion, or within one year of the time of retention, as the case may be. The term "disabled veteran" shall also mean:

(1) A veteran who served in world war I, who continued to serve in the armed forces of the United States after the eleventh day of November, nineteen hundred eighteen, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the second day of July, nineteen hundred twenty-one.

(2) A veteran who served in world war II, who continued to serve in the armed forces of the United States after the second day of September, nineteen hundred forty-five, and who is certified, as hereinbefore provided by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by him in such service on or before the date that world war II is declared terminated.

(3) A veteran who served during hostilities participated in by the military forces of the United States subsequent to June twenty-fifth, nineteen hundred fifty, and who continued to serve in the armed forces of the United States after the twenty-seventh day of July, nineteen hundred fifty-three, and who is certified, as hereinbefore provided, by the United States veterans' administration as receiving disability payments upon the certification of such veterans' administration for a disability incurred by

him in such service on or before the date that world war II is declared terminated.

(c) The term "time of war" shall include the following wars for the periods herein set forth:

(1) World War I, from the sixth day of April, nineteen hundred seventeen, to and including the eleventh day of November, nineteen hundred eighteen.

(2) World War II; from the seventh day of December, nineteen hundred forty-one, to and including the second day of September, nineteen hundred forty-five.

(3) Hostilities participated in by the military forces of the United States, from the twenty-sixth day of June, nineteen hundred fifty, to and including the thirty-first day of January, nineteen hundred fifty-five.

(4) Hostilities participated in by the military forces of the United States, from the first day of January, nineteen hundred sixty-three to the seventh day of May, nineteen hundred seventy-five.

(d) The term "time of application for original appointment or promotion" shall mean the date of the establishment of an eligible list resulting from a competitive examination for original appointment or promotion, as the case may be, which date shall be the date on which the term of such eligible list commences.

(e) The term "time of retention" shall mean the time of abolition or elimination of positions.

2. Additional credits in competitive examinations for original appointment or promotion.

(a) On all eligible lists resulting from competitive examinations, the names of eligibles shall be entered in the order of their respective final earned ratings on examination, with the name of the eligible with the highest final earned rating at the head of such list, provided, however, that for the purpose of determining final earned ratings,

(1) Disabled veterans shall be entitled to receive ten points additional in a competitive examination for original appointment and five points additional credit in a competitive examination for promotion, and

(2) Non-disabled veterans shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in a competitive examination for promotion.

(b) Such additional credit shall be added to the final earned rating of such disabled veteran or non-disabled veteran, as the case may be, after he or she has qualified in the competitive examination and shall be granted only at the time of establishment of the resulting eligible list.

3. Application for additional credit; proof of eligibility; establishment of eligible list.

Any candidate, believing himself entitled to additional credit in a competitive examination as provided herein, may make application for such additional credit at any time between the date of his application for examination and the date of the establishment of the resulting eligible list. Such candidates shall be allowed a period of not less than two months from the date of the filing of his application for examination in which to establish by appropriate documentary proof his eligibility to receive additional credit under this section. At any time after two months have elapsed since the final date for filing applications for a competitive examination for original appointment or promotion, the eligible list resulting from such examination may be established, notwithstanding the fact that a veteran or disabled veteran who has applied for additional credit has failed to establish his eligibility to receive such additional credit. A candidate who fails to establish, by appropriate documentary proof, his eligibility to receive additional credit by the time an eligible list is established shall not thereafter be granted additional credit on such eligible list.

4. Use of additional credit.

(a) Except as herein otherwise provided, no person who has received a permanent original appointment or a permanent promotion in the civil service of the state or of any city or civil division thereof from an eligible list on which he was allowed the additional credit granted by this section, either as a veteran or disabled veteran, shall thereafter be entitled to any additional credit under this section either as a veteran or a disabled veteran.

(b) Where, at the time of establishment of an eligible list, the position of a veteran or disabled veteran on such list has not been affected by the addition of credits granted under this section, the appointment or promotion of such veteran or disabled veteran, as the case may be, from such eligible list shall not be deemed to have been made from an eligible list on which he was allowed the additional credit granted by this section.

(c) If, at the time of appointment from an eligible list, a veteran or disabled veteran is in the same relative standing among the eligibles who are willing to accept appointment as if he had not been granted the additional credits provided by this section, his appointment from among such eligibles shall not be deemed to have been made from an eligible list on which he was allowed such additional credits.

(d) Where a veteran or disabled veteran has been originally appointed or promoted from an eligible list on which he was allowed additional credit, but such appointment or promotion is thereafter terminated either at the end of the probationary term, he shall not be deemed to have been appointed or promoted as the case may be, from an eligible list on which he was allowed additional credit, and such appointment or promotion shall not affect his eligibility for additional credit in other examinations.

5. Withdrawal of application; election to relinquish additional credit.

An application for additional credit in a competitive examination under this section may be withdrawn by the applicant at any time prior to the establishment of the resulting eligible list. At any time during the term of existence of an eligible list resulting from a competitive examination in which a veteran or disabled veteran has received the additional credit granted by this section, such veteran or disabled veteran may elect, prior to permanent original appointment or permanent promotion, to relinquish the additional credit theretofore granted to him and accept the lower position on such eligible list to which he would otherwise have been entitled; provided, however, that such election shall thereafter be irrevocable. Such election shall be in writing and signed by the veteran or disabled veteran, and transmitted to the state civil service department or the appropriate municipal civil service commission.

6. Roster.

The state civil service department and each municipal commission shall establish and maintain in its office a roster of all veterans and disabled veterans appointed or promoted as a result of additional credits granted by this section to positions under its jurisdiction. The appointment or promotion of a veteran or disabled veteran as a result of additional credits shall be void if such veteran or disabled veteran, prior to such appointment or promotion, had been appointed or promoted as a result of additional credits granted by this section.

7. Preference in retention upon the abolition of positions.

In the event of the abolition or elimination of any position in the civil service for which eligible lists are established or any position the incumbent of which is encompassed by section eighty-a of this chapter, any suspension, demotion or displacement shall be made in the inverse order of the date of original appointment in the service subject to the following conditions:

(1) blind employees shall be granted absolute preference in retention; (2) the date of such original appointment for disabled veterans shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law; (3) the date of such original appointment for non-disabled veterans shall be deemed to be thirty months earlier than the actual date, determined in accordance with section thirty of the general construction law; (4) no permanent competitive class employee subject to the jurisdiction of the civil service commission of the city of New York who receives an injury in the line of duty, as defined in this paragraph, which requires immediate hospitalization, and which is not compensable through workmen's compensation may be suspended, demoted or displaced pursuant to section eighty of this chapter within three months of the date of his confinement, provided that medical authorities approved by such commission shall certify that the employee is not able to perform the duties of his position; provided further, that such three-month period may be extended by such commission for additional periods not to exceed one year each upon the certification of medical authorities selected by such commission that the employee is, as a result of his injury, still not able to perform the duties of his position. An injury in the line of duty, as used herein, shall be construed to mean an injury which is incurred as a direct result of the lawful performance of the duties of the position. In determining whether an injury was received in the line of duty, such commission shall require the head of the agency by which the employee is employed to certify that the injury was received as a direct result of the lawful performance of the employee's duties; and (5) the spouse of a veteran with one hundred percent service connected disability shall be deemed to be sixty months earlier than the actual date, determined in accordance with section thirty of the general construction law, provided, the spouse is domiciled with the veteran-spouse and is the head of the household. This section shall not be construed as conferring any additional benefit upon such employee other than a preference in retention. Such employee shall be subject to transfer

upon the abolition of his function within his agency or department.

7-a.

For the purpose of subdivision seven of this section, the terms "date of original appointment" and "date of original appointment in the service" shall mean, for persons subject to subdivision one-a of section eighty of this chapter, the date of original appointment on a permanent basis in the grade or title in the service of the governmental jurisdiction in which such abolition or reduction occurs.

8. Penalty for denial of preference in retention.

A refusal to allow the preference in retention provided for in this section to any veteran or disabled veteran, or a reduction of his compensation intended to bring about his resignation shall be deemed a misdemeanor, and any such veteran or disabled veteran shall have a right of action therefor in any court of competent jurisdiction for damages and for righting the wrong.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1803

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Appellant,

v.

EDUARDO SOTO-LOPEZ and ELIEZAR BAEZ-HERNANDEZ,
Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

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BRIEF OF VIETNAM VETERANS OF AMERICA AS *AMICUS CURIAE*

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November 1, 1985

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QUESTION PRESENTED

1. Does the State of New York violate the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution by granting preference in civil service eligibility to one group of resident veterans of the armed services over another group of similarly situated resident veterans solely on the basis of pre-induction residence within the State?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	2
BACKGROUND INFORMATION	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. NEW YORK'S VETERANS' PREFERENCE SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE BY AWARDING CERTAIN BENEFITS TO RESIDENT VETERANS AND DENYING THOSE BENEFITS TO OTHER RESIDENT VETERANS SOLELY ON THE BASIS OF PAST RESIDENCE	8
A. State Schemes That Distribute Benefits Unequally Must Withstand Equal Protection Scrutiny	9
B. New York's Asserted Justifications for Discriminating Against Post-Induction Resident Veterans Are Not Rationally Related to Any Legitimate State Interest	10
1. The Discriminatory Preference Is Not Rationally Related to Any Legitimate State Interest in Encouraging Service in the Armed Forces	11
2. Rewarding the Past Contributions of Only Those Resident Veterans Who Lived in New York at the Time of Induction Is Not a Legitimate Purpose	12

TABLE OF CONTENTS—Continued

	Page
3. New York's Distinction Between Resident Veterans Is Not Rationally Related to Its Asserted Interest in Encouraging People To Settle in New York and To Enter the Civil Service After Wartime	15
II. NEW YORK'S VETERANS' PREFERENCE SCHEME ALSO VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL FREELY AMONG THE STATES	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:

	Page
Andrade v. Nadel, 477 F. Supp. 1275 (S.D.N.Y. 1979)	7
August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y.), *aff'd*, 417 U.S. 901 (1374)	7, 8
Dunn v. Blumstein, 405 U.S. 330 (1972)	12, 15, 16, 17
Hicklin v. Orbeck, 437 U.S. 518 (1978)	6, 17
Hooper v. Bernalillo County Assessor, 105 S.Ct. 2862 (1985)	*passim*
Johnson v. Robinson, 415 U.S. 361 (1974)	13
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	12, 17, 18
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)	13
Shapiro v. Thompson, 394 U.S. 618 (1969)	9, 12, 16, 17, 18
Sosna v. Iowa, 419 U.S. 393 (1975)	17, 18
Soto-Lopez v. New York City Civil Service Commission, 755 F.2d 266 (2d Cir. 1985)	1, 8, 11, 18
Sugarman v. McDougall, 413 U.S. 634 (1973)	9
United States v. Guest, 383 U.S. 745 (1966)	16
Vlandis v. Kline, 412 U.S. 441 (1973)	7
Zobel v. Williams, 457 U.S. 55 (1982)	*passim*

STATUTES:

	Page
N.Y. Civil Service Law § 85(a) (McKinney 1983)	7, 8
N.Y. Constitution art. V, § 6 (McKinney 1982)	7, 8
Emergency Veterans Job Training Act of 1983, Pub. L. No. 98-77, 97 Stat. 443 (as codified at 29 U.S.C. § 1721 (1983 Supp.))	2
Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1323 (1982) (as codified at 29 U.S.C. § 1721 (1982))	2
Veterans' Preference Act of 1944, Ch. 287, 58 Stat. 387 (as codified at 5 U.S.C. § 3310 (1982))	4

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS:	Page
The Emergency Vietnam Veterans Job Training Act of 1983: Hearings Before The Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983)	4
On-the-Job and Apprenticeship Training Programs: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983)	4, 5
Oversight Hearing on the Emergency Veterans' Job Training Act of 1983: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs, 98th Cong., 2d Sess. (1984)	4
Oversight Hearing on Veterans Preference in the Federal Government: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983)	4
Oversight of Veterans Employment Programs: Hearings Before the Subcomm. on Health and Readjustment of the Senate Comm. on Veterans' Affairs, 95th Cong., 1st Sess. (1977)	4, 5
Wheeler, *Vietnam Vets: Tomorrow's Leaders*, Wash. Post, Nov. 12, 1979, *quoted in The Vietnam Veterans Leadership Program/Action: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. (1981)	3
Veterans' Unemployment Problems: Hearings Before the Subcomm. on Readjustment, Education and Employment of the Senate Comm. on Veterans' Affairs, 94th Cong., 1st Sess. (1975)	4, 5

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BRIEF OF VIETNAM VETERANS OF AMERICA AS *AMICUS CURIAE*

Vietnam Veterans of America submits this brief as *amicus curiae* in support of appellees and affirmance of the decision of the United States Court of Appeals for the Second Circuit in this case, rendered on February 15, 1985.[1] Pursuant to Rule 36.2 of the Rules of this Court, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

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[1] The Second Circuit's decision in *Soto-Lopez v. New York City Civil Service Commission* is reported at 755 F.2d 266 (2d Cir. 1985). The district court's decision is unreported.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Vietnam Veterans of America ("VVA") is the largest national organization devoted exclusively to serving the interests and addressing the needs of veterans who served in the United States armed forces during the Vietnam era (proclaimed by President Gerald R. Ford to be August 5, 1964, to May 7, 1975). VVA is a nonprofit organization incorporated in 1978 under the laws of the State of New York and is exempt from federal income taxation pursuant to 26 U.S.C. §§ 501(a) and 501(c)(19) (1982). It has nearly 20,000 members in 165 chapters located in 38 states, the District of Columbia, and Puerto Rico, all of whom are veterans who served on active duty during the Vietnam era. More than 20 percent of VVA's members (4,200) live in New York, all of whom are potentially affected by the New York veterans' preference scheme challenged herein by appellees.

VVA was founded to foster and promote improvement in the economic, physical, and social well-being of Vietnam veterans and has participated in litigation seeking to achieve these purposes. Most recently, VVA appeared before this Court as *amicus curiae* in *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180 (1985), to challenge the attorneys fee limitation in veterans' benefits claims adjudications contained in 38 U.S.C. § 3404(c) (1982). In addition, VVA has participated in the legislative process focusing on the particular employment problems of Vietnam-era veterans. VVA participated actively in the consideration leading to the enactment of the Emergency Veterans Job Training Act of 1983,[2] which provides private sector on-the-job training for 30,000 Vietnam-era veterans, and Title IV(C) of the Job Training Partnership Act,[3] which provides funding

[2] Pub. L. No. 98-77, 97 Stat. 443 (as codified at 29 U.S.C. § 1721 (1983 Supp.)).

[3] Pub. L. No. 97-300, 96 Stat. 1323, 1380-81 (1982) (as codified at 29 U.S.C. § 1721 (1982)).

for community-based job programs for Vietnam era veterans. VVA is participating in this case because it has a particularly strong interest in ameliorating the very serious employment problems experienced by substantial numbers of Vietnam-era veterans.

VVA also has a strong interest in seeing that all Vietnam-era veterans are treated equally with respect to the distribution of federal and state benefits to wartime veterans. All wartime veterans make the same contributions to our nation and its people when they leave their homes and jobs, disrupt their personal lives, and risk their physical safety in order to ensure liberty at home and around the world. For a state to reward one group of wartime veterans and deny the same benefits to others who have made an identical contribution solely on the basis of where they resided before they entered the armed services of our country is irrational, impermissible, and destructive of the common values and founding principles of our United States.

BACKGROUND INFORMATION

It has been observed that Vietnam veterans, perhaps more so than any other wartime veterans in the nation's history, are people who

> ". . . sacrifice[d] themselves for others and for things they believe[d] in. . . . [T]hey are the ones who, in spite of the irresolution of the national sentiment, put their personal selves second to the national will as expressed by an elected president and Congress. The orders said Vietnam. They went. Even with full allowance for the mixture of events and motives that bring a man to war, there remains a valid thread of personal sacrifice that ties the Vietnam veterans together."[4]

[4] Wheeler, *Vietnam Vets: Tomorrow's Leaders*, Wash. Post, Nov. 12, 1979, *quoted in The Vietnam Veterans Leadership Program/ Action: Hearings Before the Subcomm. on Education, Training*

In recognition of the personal sacrifices made by veterans, many states,[5] as well as the federal government,[6] award civil service eligibility preferences to honorably discharged veterans. Such preferences serve as a tangible expression of gratitude for veterans' service to the country and a measure of compensation for the disruption to their personal lives by attempting to ease their transition into civilian life. Veterans' employment preferences are not a recent phenomenon, but they are especially important to veterans of the Vietnam war.

The serious difficulties experienced by many Vietnam veterans—particularly those who are disabled or members of minority groups—in obtaining suitable civilian employment are well documented.[7] The persistence and intracta-

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and Employment of the House Comm. on Veterans' Affairs, 97th Cong., 1st Sess. 52 (1981).

[5] *See The Attorney General of the State of New York v. Eduardo Soto-Lopez, et al.*, Jurisdictional Statement (filed May 15, 1985) at 16 n.*.

[6] *See, e.g.*, Veterans' Preference Act of 1944, Chap. 287, 58 Stat. 387 (as codified at 5 U.S.C. § 3310 (1982)).

[7] *See, e.g., Oversight Hearing on the Emergency Veterans' Job Training Act of 1983: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs*, 98th Cong., 2d Sess. (1984); *The Emergency Vietnam Veterans Job Training Act of 1983: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983); *Oversight Hearing on Veterans Preference in the Federal Government: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983); *On-the-Job and Apprenticeship Training Programs: Hearings before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983); *Oversight of Veterans Employment Programs: Hearings Before the Subcomm. on Health and Readjustment of the Senate Comm. on Veterans' Affairs*, 95th Cong., 1st Sess. (1977); *Veterans' Unemployment Problems: Hearings Before the Subcomm. on Readjustment, Education and Employment of the Senate Comm. on Veterans' Affairs*, 94th Cong., 1st Sess. (1975).

bility of these problems are perhaps less well known, but also documented. For example, in 1975, unemployment among young Vietnam veterans was 20 percent, more than one and one-half times the rate of unemployment among young nonveterans.[8] These alarming statistics prompted former Secretary of Labor Ray Marshall to promise in his swearing-in speech that the Carter administration would propose ameliorative programs "to help eradicate this blight on the Nation's conscience":

> "The American people have a tradition of fulfilling their obligations to those who served this country in the armed services by providing assistance to veterans in readjusting to their disrupted civilian lives. . . . We cannot permit ourselves to become insensitive to the plight of thousands of Vietnam-era veterans who have borne the brunt of our involvement in [the Vietnam] war and continue to bear a disproportionate share of the Nation's economic distress." [9]

Although the nation is no longer believed to be in "economic distress," the plight of Vietnam veterans has not improved. In fact, it has worsened. By 1983, the unemployment rate among Vietnam veterans actually had risen to 21.8 percent—while the comparable rate for nonveterans was 13.7 percent.[10]

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[8] *Veterans' Unemployment Problems: Hearings Before the Subcomm. on Readjustment, Education, and Employment of the Senate Comm. on Veterans' Affairs*, at 1 (statement of Vance Hartke, Chairman).

[9] *Oversight of Veterans Employment Programs: Hearings Before the Subcomm. on Health and Readjustment of the Senate Comm. on Veterans' Affairs* at 209-10 (Appendix B, Statement of Ray Marshall, Secretary of Labor).

[10] *On-the-Job and Apprenticeship Training Programs: Hearings Before the Subcomm. on Education, Training and Employment of the House Comm. on Veterans' Affairs* at 2 (1983).

It is against this background of real sacrifice and enduring hardship experienced by many thousands of Vietnam-era veterans that New York's discriminatory preference system favoring only its own past residents must be analyzed.

SUMMARY OF THE ARGUMENT

When a state distributes benefits unequally, the distinctions it makes between those granted and those denied the benefits are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). When the purpose of those distinctions is to reward its citizens for past contributions to the state or to express a preference for established residents over newer residents, such a distribution plan is constitutionally unacceptable. *Id.* at 65.

In the particular context of veterans' preference schemes, this Court decided last term that a state violates the Equal Protection Clause when it awards a property tax exemption only to those honorably discharged veterans who were resident within the state at a particular point in time in the past. *Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862, 2869 (1985). The New York preference scheme here under review suffers from the same constitutional infirmity. It impermissibly favors resident veterans who established their residence in New York before induction over resident veterans who migrated to the state after induction.

Because New York's distribution scheme denies eligibility for the veterans' preference only to those honorably discharged veterans who have migrated to New York since they were inducted into the service, that scheme is invalid for the further, independent reason that it penalizes exercise of the constitutional right to travel freely among the several states. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518 (1978).

ARGUMENT

Article V, Section 6 of the New York Constitution [11] and Section 85 of the New York Civil Service Law [12] together operate to create two groups of New York residents who are honorably discharged veterans of war: (1) those who resided in New York on or before the date of their induction into the armed services and (2) those who migrated to New York thereafter. To those resident veterans who established pre-induction residence, New York awards a significant benefit that it denies forever to those resident veterans who did not establish pre-induction residence: bonus points added to their competitive civil service examination results. Addition of such points is a substantial benefit in obtaining civil service employment; it frequently means the difference between being hired and not being hired.[13]

The discrimination between these two groups of resident New York veterans has one and only one apparent justification: "favoring established residents over new residents." *Vlandis v. Kline*, 412 U.S. 441, 450 (1973). Because that justification is "constitutionally unacceptable," *Zobel v. Williams*, 457 U.S. 55, 65 (1982), the New York veterans' preference scheme violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment.[14]

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[11] N.Y. Constitution art. V, § 6 (McKinney 1982).

[12] N.Y. Civil Service Law § 85(a) (McKinney 1983).

[13] In *August v. Bronstein*, 369 F. Supp. 190, 191 (S.D.N.Y.), *aff'd*, 417 U.S. 901 (1974), the denial of bonus points to the plaintiff dropped his eligibility ranking from 36 to 105.5. In *Andrade v. Nadel*, 477 F. Supp. 1275, 1279 (S.D.N.Y. 1979), a non-citizen resident veteran was erroneously awarded bonus points that placed him at number 3,556 on the civil service list and resulted in a job. Without the points, he would have ranked 9,145 on the list, a ranking that was unlikely to result in a job during the life of the list.

[14] This Court summarily affirmed a three-judge court decision upholding this New York veterans' preference scheme against equal

In addition to violating the Equal Protection Clause, the New York distribution scheme here under consideration also violates the constitutionally protected right to travel by penalizing free interstate migration. This interference with the right to travel provides an independent basis for this Court's invalidation of the New York preference scheme.

I. NEW YORK'S VETERANS' PREFERENCE SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE BY AWARDING CERTAIN BENEFITS TO RESIDENT VETERANS AND DENYING THOSE BENEFITS TO OTHER RESIDENT VETERANS SOLELY ON THE BASIS OF PAST RESIDENCE.

Article V, Section 6 of the New York Constitution, as implemented by Section 85 of the Civil Service Law, provides that appointments and promotions in the civil service of the state shall be made on the basis of merit and fitness, as determined by competitive examination. Section 6 also specifically provides that any member of the armed forces currently residing in New York who was also a resident of New York at the time of induction, served during time of war, and was honorably discharged is entitled to receive a one-time bonus of five additional points in a competitive examination for an original appointment and two and one-half additional points in an examination for promotion. N.Y. Constitution art. V, § 6 (McKinney 1982). *See Soto-Lopez v. New York City*

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protection and right to travel challenges in 1974. *August v. Bronstein*, 417 U.S. 901 (1974), *aff'g* 369 F. Supp. 190 (S.D.N.Y.) (three-judge court). Whether this Court's decisions in *Zobel v. Williams*, 457 U.S. 55 (1982), or *Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862 (1985), do or do not "vitiate the precedential effect of *August*," as the Attrney General contends, this Court has already noted in *Hooper* that the summary of affirmance in *August* "may not read as an adoption of the reasoning of the judgment under review." *Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2868 n.11.

Civil Service Comm'n, 755 F.2d 266, 270 (2d Cir. 1985).[15] Resident veterans of New York who served during time of war and were honorably discharged but who were not residents of the state at the time of their induction are not given the bonus points.

A. State Schemes That Distribute Benefits Unequally Must Withstand Equal Protection Scrutiny.

When a state distributes benefits unequally among similarly situated persons residing within its borders, the classifications it creates to determine eligibility are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). Under traditional equal protection analysis, a state distribution scheme that either denies a fundamental right or employs a suspect classification to determine eligibility will be struck down unless the distinction that is made between otherwise similarly situated groups is necessary to achieve a compelling governmental interest.[16]

New York's distribution scheme favoring prior resident veterans over subsequent resident veterans is properly subjected to heightened scrutiny under the Equal Protection Clause because it directly penalizes exercise of the fundamental right to travel by denying preference points to honorably discharged veterans who took up residence in New York after induction into the service. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). It is unnecessary in this case, however, for the Court to determine that heightened scrutiny is appropriate in every case where a state distribution system discriminates among

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[15] Disabled veterans receive ten additional points for an original appointment and five additional points for a promotion.

[16] *Shapiro v. Thompson*, 394 U.S. 618 (1969) (fundamental right to travel cannot be burdened absent compelling state interest); *Sugarman v. McDougall*, 413 U.S. 634, 642-43 (1973) (striking down statutory prohibition against employment of aliens in state competitive service).

residents on the basis of when they became residents, for New York's discriminatory preference in favor of prior residents does not rationally further any legitimate state purpose.[17]

B. New York's Asserted Justifications for Discriminating Against Post-Induction Resident Veterans Are Not Rationally Related to Any Legitimate State Interest.

There is no dispute that New York's preference scheme creates two classes of bona fide resident veterans, one of which receives bonus civil service points, and one of which does not, based solely upon whether the veterans were New York residents at the time they entered the service. The Attorney General of New York seeks to justify this admittedly unequal distribution of benefits on the ground that it is a rational means of furthering several legitimate state interests: (1) to encourage New York residents to enter the armed services in time of war;[18] (2) to compensate New York residents for service in the armed forces and to lessen the burdens imposed by military service;[19] and (3) to encourage individuals to settle in New York and enter the state's civil service at the end of their wartime service in the military.[20]

As the Second Circuit Court of Appeals concluded and as we demonstrate below, either New York's asserted interests are not legitimate or the means chosen by New York to effectuate them are not rationally related to such interests.

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[17] *Cf. Zobel v. Williams*, 457 U.S. at 60-61; *accord Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2866.

[18] Appellant's Brief at 23.

[19] *Id.* at 28.

[20] *Id.* at 29.

1. *The Discriminatory Preference Is Not Rationally Related to Any Legitimate State Interest in Encouraging Service in the Armed Forces.*

Amicus agrees with the Attorney General that "[t]he use of . . . bonuses and preferences to further the purpose of encouraging state residents to enter the armed services has a long and respected history."[21] The Attorney General is singularly unpersuasive, however, in arguing that restricting the preference to residents of New York who were also residents on the date of induction is rationally related to the state's interest in encouraging service in the armed forces during time of war.[22]

As the court below observed, a state has a legitimate interest in encouraging service in the armed forces during time of war, since it gains important benefits from service performed by individuals in the armed forces. *See Soto-Lopez v. New York Civil Service Comm'n*, 755 F.2d at 277. But the state has no legitimate interest in encouraging only its own residents to enter the armed services, since the service performed is service to the nation as a whole and the benefits flowing to the state are unrelated to the induction-date residence of the inductee. *See id.*; *see also Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2868.[23]

Because the distinction that New York makes between prior and subsequent resident veterans in awarding preference points cannot possibly further the state's legitimate purpose in encouraging all eligible persons to serve

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[21] *Id.* at 24.

[22] *See id.* at 23.

[23] The New York scheme probably interferes with the legitimate purpose of encouraging wartime service by all eligible persons, for it is likely that a veterans' preference scheme benefitting all honorably discharged wartime veterans equally, regardless of pre-induction residence, would encourage more people to enter the service.

[23] Appellant's Brief at 24 n.16.

during time of war, the Attorney General suggests in the alternative that perhaps the distinction can be upheld as a means of ascertaining bona fide residence for purposes of determining eligibility for the benefit.[24] New York's pre-induction residency requirement is hardly a test of bona fide residence, however, because it requires that residence be established far in advance—perhaps years before—the distribution of the benefit. Therefore, the pre-induction residence requirement has precisely the same effect as durational residence requirements consistently struck down by this Court as violative of the Equal Protection Clause. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Moreover, eligibility for the benefit is not in fact determined on the date of induction, as the Attorney General argues,[25] because additional eligibility criteria must be met thereafter. The eligible veteran must have been honorably discharged (an event that cannot be foreseen with certainty) and must have served during "time of war." Since the United States has not participated in any declared war since World War II, the preference has applied in recent years only to "time[s] of war" whose commencement and termination dates were fixed *after the fact* by the legislature.

2. *Rewarding the Past Contributions of Only Those Resident Veterans Who Lived in New York at the Time of Induction Is Not A Legitimate Purpose.*

The Attorney General of New York also seeks to justify the state's discriminatory preference in favor of past residents as a means of "compensat[ing] partially its residents for the disruption in their lives and interrup-

[24] *See* Appellant's Brief at 25-28.

[25] *Id.* at 26.

tion of their residence caused by service in time of war."[26] *Amicus* does not question the legitimacy of a state's interest in distributing benefits to veterans in partial compensation for their past contributions to the nation and her people in time of war. *See, e.g., Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2867; *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Johnson v. Robison*, 415 U.S. 361 (1974). A state's preferring its own prior resident veterans over subsequent resident veterans in the distribution of benefits solely on the basis of when the veteran became a resident is an illegitimate purpose, however. *See Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2868-69, *see also Zobel v. Williams*, 457 U.S. at 65.[27]

This Court reiterated in *Hooper*, citing *Zobel*, that a state may award certain benefits to all bona fide resident veterans, and deny those benefits to non-veterans, without violating the Equal Protection Clause. *Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2869. What the state may not do, however, is to favor established residents over new residents because the state wants to "take care of its own," defining "its own" in terms of residence at a point in time past. Newcomers, by establishing bona fide residence in the state, become the state's "own" and may not be discriminated against on the basis of the recency of their arrival in the state. *Id.* As this Court held in *Hooper*,

> "The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for their 'past contributions' toward our na-

[26] Appellant's Brief at 28.

[27] The Attorney General does not argue that awarding the bonus points to both groups of resident veterans would deplete state resources. Therefore, the justification for unequal distribution of the tax exemption that the dissent in *Hooper* characterized as valid does not apply here. *Hooper v. Bernalillo County Assessors*, 105 S.Ct. at 2871 (Stevens, J., dissenting).

> tion's military effort in Vietnam. *Zobel* teaches that such an objective is 'not a legitimate state purpose.' The state may not favor established residents over new residents based on the view that the state may take care of 'its own,' if such is defined by prior residence."

Id. (citations omitted.)[28]

In an effort to avoid the manifest (and unavoidable) implications of *Hooper* for this case, the Attorney General argues that New York's preference scheme is distinguishable from the tax exemption challenged in *Hooper* because it prospectively, not retroactively, authorizes benefits for pre-induction residents who serve during time of war.[29] The retroactivity of the benefit in *Hooper* was not its fatal flaw, however. This Court struck down the New Mexico statute because it created two classes of bona fide resident veterans and discriminated between them solely on the basis of prior residence, notwithstanding that both had made identical personal sacrifices and contributions to the public welfare and safety.[30] *Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2867-68. The retroactivity

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[28] *See also Hooper v. Bernalillo County Assessors*, 105 S.Ct. at 2868 n. 13 ("[In Zobel we] made clear that the statute's only conceivable purpose—to 'reward citizens for past contributions'—is 'not a legitimate state purpose' " (Citations omitted)).

[29] Appellant's Brief at 28. In fact, however, the benefit is not made available either at the time prior residence is established or at the time of induction. *See* p. 12 *supra*.

[30] As this Court observed in *Hooper*, in terms equally pertinent to New York:

> "Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other states who served, so that the latter would not deserve the benefits a state bestows for national military service."

Hooper v. Bernalillo County Assessor, 105 S.Ct. at 2868.

of the New Mexico statute merely demonstrated how unpersuasive was the state's argument that the scheme was enacted as a means of encouraging state residents to enter the armed services.

3. *New York's Distinction Between Resident Veterans Is Not Rationally Related to Its Asserted Interest in Encouraging People To Settle in New York and to Enter the Civil Service After Wartime.*

Finally, the Attorney General seeks to justify the distinction the State makes between prior and subsequent resident veterans on the ground that the scheme encourages individuals to establish residence in New York, to join the armed services, and to return to the state after military service to seek public employment.[31] It is in New York's interest, so the argument goes, to entice prior residents to return to the state after wartime service because their "knowledge and experience [of the local environment], when coupled with the valuable training the individual acquires while serving in the armed services," [32] makes such veterans "particularly attractive to public sector employers within the State." [33] Even if a state can legitimately prefer more knowledgeable applicants over less knowledgeable applicants for civil service positions, New York's discrimination in favor of veterans who were residents of the state at the time of induction is not rationally related to that purpose.[34]

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[31] Appellant's Brief at 29.

[32] *Id.* at 30.

[33] *Id.*

[34] *Cf. Dunn v. Blumstein*, 405 U.S. 330, 357-58 (1972) ("[T]he durational residency requirements in this case founder because of their crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise. The classifications created by durational residence requirements obviously permit any lor[illegible]time resident to vote regardless of his knowledge

For one thing, the preference is not limited to prior residents who held civil service positions prior to induction. Nor is the preference limited to those prior residents who demonstrate "knowledge of the local environment—its government workings, its people and their problems. . . ."[35] In fact, since the prior resident veteran need have been a resident for no particular period of time, there is no correlation of any kind between the preference and any "knowledge of the local environment."

II. NEW YORK'S VETERANS' PREFERENCE SCHEME ALSO VIOLATES THE FUNDAMENTAL RIGHT TO TRAVEL FREELY AMONG THE STATES.

This Court has long recognized that the right to travel from one state to another "occupies a position fundamental to the concept of our Federal Union." *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), *quoting United States v. Guest*, 383 U.S. 745, 757 (1966). A statute implicates the right to travel when it uses any classification that penalizes the exercise of that fundamental right, including statutory distinctions drawn between newcomers and longer term residents. *Dunn v. Blumstein*, 405 U.S. 330, 340-41 (1972); *Zobel v. Williams*, 457 U.S. at 60 n.6; *id.* at 66 n.1 (Brennan, J., concurring).

The Court's decisions leave no doubt that when the constitutional right to travel is involved, a higher level of scrutiny is triggered. The Court has held, for example, that the burden on the right to travel must further a compelling state interest when the distinction between

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of the issues. . . . On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become at least minimally, and often fully, informed about the issues").

[35] Appellant's Brief at 30.

new residents and longer term residents denies the new residents the right to vote, *Dunn v. Blumstein*, 405 U.S. 330 (1972), the right to medical care, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), or the right to welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969). When the distinction drawn between residents and nonresidents affects such matters as access to divorce court or the granting of employment preferences, the state must demonstrate that a substantial reason exists for the distinction. *See, e.g., Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year durational residence requirement challenged on equal protection/right to travel grounds); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (employment preference for residents challenged on Privileges and Immunities grounds). A substantial reason does not exist unless there is something to indicate that nonresidents constitute a peculiar source of the evil at which the discriminatory statute is aimed. *Hicklin v. Orbeck*, 437 U.S. at 526.[36]

The only kind of durational residence requirement that has been upheld by this Court is a test of bona fide residence to determine that an individual is in fact a resident of the state and, therefore, entitled to receive its benefits or exercise rights it confers. *See e.g., Dunn v. Blumstein*, 405 U.S. at 349-54.[37] Such a test must be the least bur-

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[36] The Attorney General does not argue, however, that New York's resident veterans who settled in the state sometime after their induction constitute a "source of evil."

[37] *Cf. Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna*, the Court upheld Iowa's one-year residence requirement for access to its divorce courts on the ground that the State had demonstrated its substantial interests in protecting its divorce decrees from collateral attack, particularly attacks based on insufficient evidence of "domicile," and in ensuring that divorce petitioners had the requisite connection with the state. The Court also observed that the durational residence requirement did not permanently foreclose the appellant from access to Iowa's courts. *Sosna v. Iowa*, 419 U.S. at 404-09.

densome means of achieving the state's purpose of identifying its residents, and it must determine bona fide residence as near as administratively possible to the time the benefit is to be distributed or the right exercised, not at some time in the past. *See, e.g., Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2865-66; *Dunn v. Blumstein*, 405 U.S. at 343, 349-54; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267; *Shapiro v. Thompson*, 394 U.S. at 636-37.

The New York veterans' preference scheme employs a classification that penalizes one group of bona fide resident veterans—those who settled in New York after their induction. Since, as *amicus* demonstrated above and as the court below concluded, the scheme fails even to satisfy the rational basis test, it follows that the scheme cannot withstand the heightened scrutiny to which statutes that burden interstate travel must be subjected. *Soto-Lopez v. New York City Civil Service Comm'n*, 755 F.2d at 280; *see also Hooper v. Bernalillo County Assessor*, 105 S.Ct. at 2869; *Zobel v. Williams*, 457 U.S. at 60-61, 65.

The Attorney General argues that the distinction drawn between earlier and later resident veterans does not violate the constitutionally protected right to travel because that right is not burdened at the time eligibility for the benefit is determined (*i.e.*, upon induction into the armed services) and because the award of bonus points is in any event too modest a benefit to unreasonably burden the right to travel.[58] Neither argument is persuasive.

The Attorney General's assertion that the veteran "automatically" becomes eligible for the preference at the time of entry[59] is inconsistent with the very terms of

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[58] Appellant's Brief at 31-32.

[59] *Id.* at 24-25.

Article V, section 6 and Section 85. In fact, eligibility is determined only after the nature of the veteran's discharge is determined (at the time of discharge) and after the legislature has made a determination as to whether the nation was involved in a "time of war" (which could be long after discharge). The veteran who moves to New York and seeks employment in the civil service is clearly penalized for having exercised his right to leave his prior home and settle in New York because resident veterans who established residence in New York on or before the date of induction are granted a preference denied to them.

Nor does the relative size of the penalty determine whether the right to travel has been violated. The appropriate inquiry is whether the classification penalizes the right to travel, not whether the penalty for exercising the right is substantial or *de minimis*. In no case of which we are aware has this Court ever upheld a durational residence requirement in the face of a right to travel challenge on the ground that the benefit conferred was "modest." In any event, the award of bonus points is a substantial benefit to veterans because bonus points can mean the difference between obtaining and not obtaining a civil appointment.[60]

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[60] *See* n.13 *supra*.

CONCLUSION

Even without the benefit of this Court's decision in *Hooper*, the court below correctly concluded that New York's veterans' preference scheme violated the equal protection and right to travel guarantees of the United States Constitution. For the reasons set forth above and in appellees' brief, *amicus* respectfully urges the Court to affirm the decision of the court below.

Respectfully submitted,

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